Supreme Court, U.S.
FILED
FEB 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1453

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

COLORADO FLYING ACADEMY, INC., a Colorado Corporation; FEDERAL INSURANCE COMPANY; and ASSOCIATED AVIATION UNDERWRITERS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER ALL ACTS OF AN FAA EMPLOYEE, NO MATTER HOW NEGLIGENT, ARE IMMUNIZED BY THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT, IF SOME OF THE EMPLOYEE'S ACTS ARE DISCRETIONARY, NO MATTER HOW TENUOUS THE RELATIONSHIP BETWEEN THE ACTS.

II. WHETHER AN FAA EMPLOYEE'S DECISION TO EXCLUDE FROM THE PROTECTION OF A TERMINAL CONTROL AREA (TCA) A PORTION OF AN INSTRUMENT APPROACH RETAINS THE DISCRETIONARY NATURE AND IMMUNITY UNDER THE FEDERAL TORT CLAIMS ACT, WHEN THAT DECISION IS IN CLEAR VIOLATION OF THE DECISIONS AND STANDARDS MADE AND SET BY HIGHER GOVERNMENT AUTHORITY IN THE EXERCISE OF THEIR DISCRETION.

III. WHETHER THE FAA MAY PROMULGATE A REGULATION AGAINST MID-AIR COLLISION AND THEN ASSERT ITS VIOLATION AS NEGLIGENCE PER SE TO RELIEVE IT OF ITS OWN CULPABILITY FOR CAUSING THE COLLISION.

LIST OF PARTIES

1. Colorado Flying Academy, Inc., a Colorado Corporation, is the petitioner herein and was the plaintiff in the United States District Court for the District of Colorado and was the appellant in the United States Court of Appeals for the Tenth Circuit. Colorado Flying Academy, Denver, Colorado, was the parent company and had no subsidiaries not wholly owned. Colorado Flying Academy was dissolved on January 1, 1985.

2. Associated Aviation Underwriters was the insurance underwriter for Colorado Flying Academy, Inc., and was made an involuntary plaintiff by the trial court. Associated Aviation Underwriters' parent companies are Continental Insurance Company and Chub Insurance Group. It has no subsidiaries or affiliates.

3. Federal Insurance Company provided the insurance coverage for Colorado Flying Academy, Inc., and was made an involuntary plaintiff by the trial court.

4. The United States of America is the respondent herein and was the defendant in the United States District Court for the District of Colorado and was the appellee in the United States Court of Appeals for the Tenth Circuit.

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To the Honorable, The Chief Justice and Associated Justices of the Supreme Court of the United States:

Colorado Flying Academy, Inc., Federal Insurance Companies, and Associated Aviation Underwriters, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on January 4, 1984.

OPINIONS BELOW

The opinion of the United States Court of Apeals for the Tenth Circuit, affirming the trial court, was filed January 4, 1984, and is reported as Colorado Flying Academy, Inc. v. United States, 724 F.2d 871 (10th Cir. 1984)(Appendix A). Plaintiff, petitioner's petition for rehearing and rehearing en banc was denied November 8, 1985, and is unreported. The judgment of the United States District Court for the District of Colorado, entering judgment in favor of the defendant and against the plaintiff, was filed on January 20, 1981, and is reported as Colorado Flying Academy v. United States, 506 F.Supp. 1221 (D.Colo. 1981).

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was filed January 4, 1984. A timely petition for rehearing was denied November 8, 1985. (Appendix C.) (Supreme Court Rule 20.4.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

STATUTES AND REGULATIONS INVOLVED

The following statutes are involved:

28 U.S.C. § 2680(a)

> The provisions of this chapter and section 1346(b) of this title [28 USCS § 1346(b)] shall not apply to --
>
> (a) Any claim based on an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATUTES AND REGULATIONS INVOLVED

49 U.S.C. § 1348

§ 1438. Airspace control and facilities.

(a) Use of airspace. The Administrator [Secretary of Transportation] is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

(b) Air navigation facilities. The Administrator [Secretary of Transportation] is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation

facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic.

(c) Air traffic rules. The Administrator [Secretary of Transportation] is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

(d) Applicability of Administrative Procedure Act. In the exercise of the rulemaking authority under subsections (a) and (c) of this section, the Administrator [Secretary of Transportation] shall be subject to the provisions of the Administrative Procedure Act, notwithstanding any exception relating to military or naval functions in section 4 thereof.

49 U.S.C. § 1421

§ 1421. Powers and duties of Secretary of Transportation.

(a) Minimum standards; rules and regulations. The Administrator [Secretary of Transportation] is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

STATUTES AND REGULATIONS INVOLVED

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator [Secretary of Transportation], the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports the Administrator [Secretary of Transportation] may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum, hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator [Secretary of Transportation] may find necessary to provide adequately for national security and safety in air commerce.

STATUTES AND REGULATIONS INVOLVED

The following regulations are involved:

49 C.F.R. § 61.45(d)

> Simulated Instrument Flight Equipment.
>
> An applicant for any flight test involving flight maneuvers by reference to instruments must furnish equipment satisfactory to the examiner that excludes the visual reference of the applicant outside of the aircraft.

49 C.F.R. § 91.21(b)

> Flight Instruction; Simulated Instrument Flight And Certain Flight Tests.
>
> (b) No person may operate a civil aircraft in simulated instrument flight unless --
>
> (1) An appropriately rated pilot occupies the other control seat as safety pilot;

(2) The safety pilot has adequate vision forward and to each side of the aircraft, or a competent observer in the aircraft adequately supplements the vision of the safety pilot; and

(3) Except in the case of lighter-than-air aircraft, that aircraft is equipped with fully functioning dual controls. However, simulated instrument flight may be conducted in a single-engine airplane, equipped with a single, functioning, throwover control wheel, in place of fixed, dual controls of the elevator and ailerons, when --

(i) The safety pilot has determined that the flight can be conducted safely; and

(ii) The person manipulating the control has at least a private pilot certificate with appropriate category and class ratings.

STATUTES AND REGULATIONS INVOLVED

49 C.F.R. § 91.67(a)

Right-of-way Rules; Except Water Operations

(a) General. When weather conditions permit, regardless of whether an operation is conducted under Instrument Flight Rules or Visual Flight Rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft in compliance with this section.

STATEMENT OF THE CASE

This case arose out of a midair collision which occurred on June 21, 1974, between two aircraft in the vicinity of Stapleton International Airport, Denver, Colorado. Jurisdiction in the trial court was based on 28 U.S.C. § 1346, the Federal Tort Claims Act.

Plaintiff claimed the local designer was negligent in failing to comply with directives and orders issued by higher authority within the Federal Aviation Administration, Washington, D.C., when designing a protective system of airspace utilization.

Defendant, United States, claimed the entire process was discretionary, and therefore, not within the ambit of the Federal Tort Claims Act.

At approximately 9:37 a.m. on June 21, 1974, a single engine Beech Bonanza and a twin engine Piper Seneca collided approximately 10 nautical miles west of Stapleton International Airport. The Bonanza crashed in Crown Hill Cemetary, killing all four occupants. The Seneca was able to make a crash landing in Sloan Lake, resulting in minor injuries to the two pilot occupants, but totally destroying the aircraft.

Plaintiff Colorado Flying Academy owned and operated the twin engine Piper Seneca. The single engine Beech Bonanza was being operated by its owner.

At the time of the collision, the Piper Seneca was under the control of the FAA radar air traffic controller, and was in the process of executing an instrument landing approach at Stapleton Internation-

al Airport. The aircraft was using the instrument landing approach procedure designated 8R ILS Backcourse. This instrument approach procedure was designed and published by the Federal Aviation Administration prior to the FAA's decision to establish a Terminal Control Area (TCA) at Denver Stapleton.

After the adoption of the 8R ILS Backcourse procedure by the FAA, the FAA decided that for certain airports, Stapleton International Airport being one, air traffic congestion and conflicts required additional safety procedures. Thus the FAA decided to promulgate for these airports, including Stapleton, the safety procedure known as the Terminal Control Area (TCA). Pursuant to the regulations that would be adopted, implementing the TCAs, all aircraft flying within the TCAs would have to be under the positive con-

trol of approach controllers for that airport. All aircraft operating within a TCA were to be required to have a special radio device known as a transponder, by which positive radar contact could be established. Those aircraft would also be required to be in continuous two-way radio contact with the approach controllers. Aircraft not so equipped and not in two-way radio contact with the approach controllers, would not be allowed to operate within the TCA.

At the time of the collision, the Piper Seneca was executing the 8R ILS Backcourse approved approach, as part of recurrent instrument training. This required the trainee pilot to wear a vision limiting device (hood) restricting vision to the instrument panel. The pilots were in radar contact and radio communication with the Denver Approach

Control as required. The Beech Bonanza was operating under visual flight rules on a flight from Arizona, via Pueblo, Colorado, to Boulder, Colorado. It was not in contact with Denver Approach Control, and was flying barely outside and below the shelf of the Denver TCA. The Seneca was initially inside the TCA, but the collision occurred at the point where the Seneca, still on the 8R ILS Backcourse approach, temporarily passed outside of the Denver TCA, and into uncontrolled airspace where aircraft like the Beech Bonanza were legally allowed to operate. If the accident had not occurred, thereafter, the Seneca, continuing on the 8R ILS Backcourse approach, would have passed back into the TCA. The collision occurred barely 100 feet under the 8000 foot shelf and outside the TCA, but while the Piper Seneca was under positive radar control

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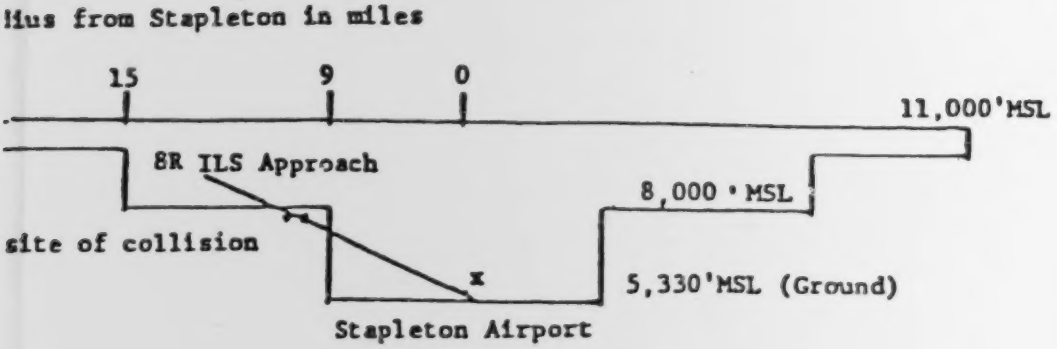
and in radio contact with Denver Approach Control.

DEPICTION OF DENVER TCA



FAA guidelines issued from Washington, D.C. to FAA field offices prior to the construction of the Denver TCA directed that the TCA be of a size "sufficient to contain existing terminal IFR procedures". Trial Exhibit 25. This was a direction that all instrument approaches be contained within the airspace to be set aside and designated as the TCAs. At the time the TCA was designed and promulgated,

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the 8R ILS Backcourse approach, which the Seneca was using, was an existing terminal instrument approach procedure. As the TCA was actually designed, a small portion of the 8R ILS Backcourse approach was not contained within the Denver TCA in violation of the directive. Subsequent to the accident, the design was modified to conform with the guidelines and specifications which had been previously issued by FAA headquarters. Only then was all of the 8R ILS Backcourse approach entirely contained within the TCA.

The United States District Court in fact found that the United States was negligent in designing, establishing, and maintaining the Denver TCA. The Court also found that the United States was negligent in failing to provide a 500 foot buffer zone, horizontally and vertically, within the Denver TCA to assure separation

between controlled and uncontrolled aircraft at or near the boundary of the TCA. However, the Court found that the United States was not subject to liability because these actions fell within the protection of the discretionary function exception to the Federal Tort Claims Act.

While it was an issue at trial, the District Court failed to make any findings with regard to the approach controller's failure to warn the Seneca of conflicting traffic which he was capable of seeing on his radar scope. In this regard it was found that the approach controller, Mr. Richard Igel, was not currently certified in accordance with FAA requirements and directives for his position at Denver Approach Control, at the time of the accident. However, ignoring Trial Exhibits 5 and 5a, an FAA study showing that such aircraft as the Bonanza would not normally

be seen by the Seneca pilots in time to avoid a collision, the Court found that the pilots of the two aircraft which collided were negligent for colliding. The court found, as a matter of law, that the pilots were negligent per se for failing to see and avoid each other, and that this negligence barred per se any recovery by the Plaintiffs. The court relied on 49 C.F.R. § 91.67, which it effectively found outlawed having collisions. Therefore, the occurrence of a collision automatically proved a violation of the anti-collison regulation. Because of the application of the "see and avoid" rule, the Court of Appeals found the trial court's failure to make these findings was harmless error, and necessary findings could be inferred from the opinion as a whole. Colorado Flying Academy, Inc., v. United States, 724 F.2d 871, 877-80, (10th Cir. 1984).

REASONS FOR GRANTING THE WRIT

I. Introduction

The most recent decision of the Supreme Court dealing with the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), left unanswered numerous questions as to the scope of the exception, and the methodology of applying the exception. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), _____ U.S. _____, 104 S.Ct. 2755 (1984).

Already the various circuits have begun to approach these problems in disparate fashions. Compare Russell v. United States, 763 F.2d 786 (10th Cir. 1985) and Hylin v. United States, 755 F.2d 751 (7th Cir. 1985) with McMichael v. United States, 751 F.2d 303 (8th Cir. 1985) and National Carriers, Inc. v. United States, 755 F.2d 675 (8th Cir. 1985).

One specific line of decisions, following the Seventh Circuit, threatens to expand the Varig decision and the discretionary function exception so much so that it would emasculate the Federal Tort Claims Act and return victims of negligent federal action to seek redress through special private bills in Congress. These decisions would look at the "total program and process", where invariably there is discretion, and immunize any acts associated with "the process". Thus, resolution of the issue is of significant national import.

Finally, the trial court found that the FAA had promulgated a rule, effectively prohibiting collisions. It then held the mere happening of a collision was proof of violation of the regulation and, therefore, was negligence per se, barring recovery for the negligence of the air

traffic controller. The court allowed the FAA, by regulation, to create yet another exception to the Federal Tort Claims Act, and which negligence or lack of qualification would completely immunize its air traffic controllers, regardless of their own acts.

II. Confusion in the Wake of Varig

Several courts of appeal are taking an extremely expansive view of Varig and are seizing on the Court's language which they believe immunized "the complete certification process" of the FAA. Some courts, and especially the United States, have confused what the plaintiffs claimed in Viacao Aerea Rio Grandense (Varig Airlines) v. United States, 692 F.2d 1205 (9th Cir. 1982), and its companion case, United Scottish Ins. v. United States, 692 F.2d 1209 (9th Cir. 1982), with what they were able to prove. Varig at 2765-66.

Admittedly, the plaintiffs in those two cases claimed the United States was negligent in its inspection. Just as clearly, and as this Court noted, all the plaintiffs proved was that the items at fault were never inspected as part of the "spot-inspection" program. Varig at 2766. This Court spent over 4 pages of its opinion in addressing the FAA's right and discretion to adopt such a "spot-inspection" program. Id. at 2760-62, 66-69. It was this discretion not to inspect which was the basis of this Court's decision.

What remained unanswered and what is causing confusion among the circuits is what happens if a government employee acts but makes a negligent inspection, i.e., looks but does not see or ignores that which he does see. Does the discretionary function exception still protect the government and the FAA from liability for the

negligence or disobedience of an employee, for a malfeasance or non-feasance of a duty which the employee is clearly required to do?

There are now two basic ways in which discretionary function exception cases are now being analyzed and decided by the United States Courts of Appeal. On one hand, some circuit courts look at the overall program to determine if any discretion is involved. These courts emphasize that in Varig, this Court immunized the "certification program" or "process". See Russell v. United States, 763 F.2d 786 (10th Cir. 1985); Hylin v. United States, 755 F.2d 551 (7th Cir. 1985); Cisco v. United States through EPA, 768 F.2d 788 (7th Cir. 1985); Natural Gas Pipeline Co. of America v. United States, 742 F.2d 502 (9th Cir. 1984); and Flammia v. United States, 739 F.2d 202 (8th Cir. 1984).

The other line is led by the Eighth Circuit, which in McMichael v. United States, 751 F.2d 303 (8th Cir. 1985) and National Carriers, Inc. v. United States, 755 F.2d 675 (8th Cir. 1985), scrutinized the acts of the employee to determine whether their acts were immunized, as opposed to whether the whole program or process was immunized. This line also includes Ostera v. United States, 769 F.2d 716 (11th Cir. 1985); Drake Towing Co., Inc. v. Meisner Marine Constr. Co., 765 F.2d 1060 (11th Cir. 1985); and Feyers v. United States, 749 F.2d 1222 (6th Cir. 1984).

A. The Process Analysis

The process analysis method of inquiring into the discretionary function exception looks at the overall program or process, and if it finds discretion in the program or process, the court immunizes all associated acts. This analytical method is now followed by the Fifth, Seventh, Ninth, and Tenth Circuits.

In Hylin v. United States, the Seventh Circuit, after this Court had vacated and remanded an earlier judgment for reconsideration in light of Varig, first focused on this Court's statement in Varig that the exception was meant to embrace the government's "role as a regulator of the conduct of private individuals." Varig at 2765. Hylin then went on to state:

> "Varig Airlines teaches that we must examine the nature of the challenged governmental activity. Id. at 2765. The appropriate inquiry is 'whether the dis-

> cretionary function exception immunizes from tort liability the FAA certification process involved in this case."

Hylin at 553 (emphasis in Hylin, quoting Varig).

While Hylin goes on to observe the employees were empowered to exercise discretion with respect to their decisio and which were challenged, the emphasis process in the analysis marks the beginn of the subordination of the inquiry into nature and quality of the actors' conduc opposed to an inquiry into overall discr which may exist in a program or process. Note the Seventh Circuit stated that it looking at the "challenged governmental activity" and not some employees' acts.

The Seventh Circuit, again in C v. United States through EPA, 768 F.2d 7 (7th Cir. 1985), limited its analysis to regulatory authority of the EPA and made

inquiry into any employees' duties which may have been established within the agency. Here, plaintiff complaining the EPA had failed to warn them that landfill under their homes was contaminated by dioxin. The court looked only at the process to determine if discretion attached to the agency; naturally, it did.

Russell v. United States, 763 F.2d 786 (10th Cir. 1985) relied heavily on Hylin but merely observed that Hylin had determined that the mine safety program was immunized. Unlike the Seventh Circuit in Hylin, the Tenth Circuit did not even discuss what, if any, discretion reposed in the inspectors under the facts of the case. It merely held the process was immunized. The only lesson the Tenth Circuit drew from Varig was that the aircraft certification process was a discretionary function. Here, the Tenth Circuit clearly did not burden itself with

review of the character or quality of the actors' conduct, but only with the nature the overall program.

The Ninth Circuit, ignoring the merits of the case and the trial court's specific finding of no negligence by the FAA, joined the Seventh and Tenth Circuit in Natural Gas Pipeline Co. of America v. United States, 742 F.2d 502 (9th Cir. 198 and held that any claim which involved inspections or certification were barred per se. This method clearly looks at the overall process and not the acts of an individual. It does not even attempt to determine whether the inspectors ignored obvious defects, or acted counter to explicit instructions from their superior

The Fifth Circuit, in Flammia v. United States, 739 F.2d 202 (5th Cir. 1984), appears to have joined the Seventh

Ninth and Tenth Circuits. While it is not at all clear, the Flammia decision repeatedly refers to the decisions of the Immigration and Naturalization Service (INS), and INS's regulatory authority to make decisions with reference to the admission of aliens, the parole of aliens, and the release of aliens. The court stated:

> "We view the language of Varig Airlines to dictate that the exemption under the Federal Tort Claims Act derived from this discretion extends in specific individual applications as well as to broad policies."

Flammia at 204.

Nowhere in the decision does the court address the actions of an individual INS employee, nor determine whether there were any internal instructions or memoranda to set standards governing actions. The Fifth Circuit merely stopped after the determination that the INS was clothed with discretion in its decisions with

regard to aliens, and found that derivati
vely all subordinate decisions received
the same benefit of this discretion. Con
sequently, the Fifth Circuit's decision
would effectively immunize all actions of
the federal government without any furthe
analysis.

B. Analysis of the Employee Acts

By comparison, the Eighth Circui
followed by the Sixth and Eleventh Circui
concentrates on the acts of the governmen
employees, when deciding whether the dis-
cretionary function applies. These court
look to see whether the employee had dis-
cretion to make the decision or to act th
way he did.

Thus, in National Carriers, Inc.
v. United States, 755 F.2d 675 (8th Cir.
1985), the court did not become embroiled
in whether the Food and Drug Administra-

tion [FDA] in its overall responsibility was required to exercise discretion in determining whether food was fit for human consumption or contaminated. Rather, the court observed that the individual employee at the scene of an overturned meat truck

> "was required to suggest separation of the exposed beef to permit the Agency to follow federal regulations to condemn or tag the contaminated beef, . . ."

Id. at 678 (emphasis supplied).

The Eighth Circuit focused on the acts of the employee and whether he had discretion. Surely if the court acted as the Fifth, Seventh, Ninth, and Tenth Circuits, and focused on the FDA acting as a regulator of the conduct of private individuals, the agency process could have been found to be discretionary. However, the National Carriers court correctly discerned that this

employee, when faced with contaminated be had no discretion. He had to suggest seg gation of the contaminated meat from the wholesome meat. The acts of the employee were not of the nature and quality Congre sought to immunize.

Earlier, the Eighth Circuit also spoke to the discretionary function excep tion in McMichaels v. United States, 751 F.2d 303 (8th Cir. 1985). Again, the cou focused on the nature of the inspectors' duties. It specifically found that safet inspectors, who were constantly on site a a munitions plant, had a number of precis mandatory inspections to perform. The inspections were mandatory; the inspector had no discretion whether to make them; therefore, the exception was inapplicable

The Eleventh Circuit, in Ostera United States, 769 F.2d 716 (11th Cir.

1985), joined the Eighth Circuit. While the Ostera court observed that the use of informants in criminal investigation was discretionary, as conceded by plaintiffs, it did not stop with that simple analysis of the process or program, but proceeded to inquire into the guidelines governing the actions of and the discretion reposing in the employee who made the decision to release a convicted criminal and use him as an informant. The court went beyond the process and examined the complained of act. While the court found discretion in the individual actor's decision, the analysis differed from and delved into considerably more detail than a Seventh Circuit "process analysis" would have.

Similarly, in Drake Towing Co., Inc. v. Meisner Marine Const. Co., 765 F.2d 1060 (11th Cir. 1985), the court analyzed the actual decision to replace buoys on a

portion of the Gulf Intracoastal Waterway. The court did not stop its analysis with th decision of whether the Coast Guard had dis cretion to replace buoys, because the Coast Guard had decided to do so. Had the Eleven Circuit decided to join the Fifth, Seventh, Ninth, and Tenth Circuits, it would have applied the discretionary function exceptio at this point. Instead, the Eleventh Circuit continued and inquired into whether having decided to act, did the Coast Guard employees have the necessary discretion, of the type Congress sought to immunize, to place the buoys negligently. The court determined that the Coast Guard employees did not have such discretion. Yet clearly, there were decisions made when each buoy wa placed.

While the Sixth Circuit was not required to take sides in Feyers v. United States, 749 F.2d 1222 (6th Cir. 1984), it

does in a footnote give indication it will align itself with the Eighth Circuit. Id. at 1227 n.7. The Sixth Circuit indicates that actual knowledge or inspection of safety violations where there is a measurable standard are not immunized by the discretionary nature of a spot check program which led to the discovery of the violations. Id. citing to Madison v. United States, 679 F.2d 736 (8th Cir. 1982).

C. Circuits Who Remain In Confusion and Apply No Analytical Method

The confusion among the circuits is further exemplified by the Third Circuit decision in General Public Utilities Corp. v. United States, 745 F.2d 239 (3rd Cir. 1984). There the circuit overturned the challenge to the Nuclear Regulatory Commission's actions in conjunction with the Three Mile Island incident. The Third Circuit indicated the plaintiffs complained that the

government failed to disclose information about a similar incident, involving another nuclear reactor designed by the same company that designed Three Mile Island. In the process of rendering its decision, the Third Circuit reviewed one of its prior decisions, Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974), on which the plaintiffs unsuccessfully sought to rely. Plaintiffs had claimed Griffin carved out an exception based on scientific professional judgments. With regard to the Three Mile Island incident, the court found the Nuclear Regulatory Commission had the discretion to decide what were the significant events sufficient to trigger the reporting requirement.

In the previous case on which the plaintiffs had sought to rely, Griffin, the Third Circuit had found that the scientific determination to approve a batch of polio vaccine was not discretionary, because there

were specific standards by which the decision could be measured, notwithstanding calling for technical and professional judgment, and because the inspector had relied on a factor not in the regulations. The Griffin panel stated:

> "The violation of a discretionary command takes what otherwise might be characterized as a 'discretionary function' outside the scope of a statutory exception."

Griffin at 1068-69; General Utilities Corporation at 246 n.8.

The Third Circuit's confusion is indicated by the comments about Griffin, and in questioning whether Griffin would continue to have vitality in the face of Varig. The court indicated its confusion over Varig when it said:

> "Griffin, however, must be read cautiously because in Varig the discretionary exception covered an agency decision that rested on highly technical information."

General Public Utilites Corporation at 246.

In this manner, the Third Circuit has evinced confusion over whether it should review the process or program in its entirety, or the individual acts of the employee, as it did in Griffin.

There is a third set of cases where the circuits have yet adopted a method of analysis, because the plaintiffs claims did not force such a selection. These cases have been decided by reference to pre-Varig authority. See Baxley v. United States, 767 F.2d 1095 (4th Cir. 1985) (claim against FAA for failure to promulgate regulation); Shuman v. United States, 765 F.2d 283 (1st Cir. 1985) (claim for failure of government to assume

duty to warn of asbestos danger in WWII shipyards); and Begay v. United States, 768 F.2d 1059 (9th Cir. 1985) (failure to warn of dangers of radiation to uranium miners; plaintiffs were unable to point to the specific agency which was responsible). This reliance on pre-Varig authority also may evince confusion on the proper application of Varig, and a hesitancy to adopt either of the two leading approaches.

In Shuman v. United States, 765 F.2d 283 (1st Cir. 1985), the First Circuit may have pointed out the distinguishing characteristics of all the cases. In its discussion of Dalehite v. United States, 346 U.S. 15 (1953), the court observed that:

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

> "No single government employee was charged with negligence, but the government itself was alleged to have committed numerous acts of negligence, . . ."

Shuman, 765 F.2d at 289.

Yet when a specific actor is alleged to be at fault, neither Dalehite nor Varig can support an analysis of only the program or process, and not the nature or quality of conduct of the actor. Unfortunately, the various circuits have reached different conclusions on how to apply the discretionary function exception. The Fifth, Seventh, Ninth, and Tenth Circuits would apply the discretionary function exception to the whole program, any time a program is found to be discretionary. Conversely, the Sixth, Eight, and Eleventh Circuits look at the actor to determine

whether he possessed the discretion to act in the way he did.

III. Rejection of the Process Analysis Method of Implementing the Discretionary Function Exception is a Question of Great National Import.

It has been observed that almost all human actions involve some decision-making, unless it is an involuntary blink of an eye or the beating of the heart. Thus, when there are decisions to be made, there is discretion. Obviously, Congress' act of creating agencies and assigning them duties is discretionary. Equally so, agencies make discretionary decisions on how best to meet their congressional mandate. Without the need to explore delegation as it proceeds down to the individual employee, it is sufficient to note that if courts persist in beginning their analysis with an agency's program and not the acts of the employee, invariably discretion will be found and the exception applied.

The Federal Tort Claims Act was itself a form of delegation. Prior to its enactment, the sole method for recovery in these types of cases was to seek a special bill in Congress. United States v. Eckford 73 U.S. 484 (1867); Reeside v. Walker, 52 U.S. 272 (1850). The impetus behind the adoption of the Federal Tort Claims Act, which with some limits waived governmental immunity on tort claims brought against the United States, was to relieve Congress of the overburden created by these private bills. By 1946, when the Federal Tort Claims Act was passed, an average of 2500 private claims were introduced in every session, nearly one half of all the bills the House. But of these only 250 to 300 would receive any kind of action. H. R. Rep. No. 717, 79th Cong., 2d Session 10049 (1946) (committee of its whole). If the Fifth, Seventh, Ninth, and Tenth Circuits'

methodology and reasoning, as discussed in Section II A, persists and remains the rule of law, the exception will swallow the rule, and once again, Congress will be the sole remedy.

If this Court's intent in Varig was to direct focus on the nature and quality of the acts of the individual employee and the scope of discretion reposed in that employee, that intent is being dangerously eroded by the Courts of Appeal decisions in the Fifth, Seventh, Ninth and Tenth Circuits. These decisions are resulting in an implied repeal of the Federal Tort Claims Act.

This case, Colorado Flying Academy, Inc. v. United States, clearly presents these issues for final resolution. Plaintiff does not dispute that the United States had the discretion to decide to adopt Terminal Control Areas, to decide at

what cities TCAs would be established, and to decide the basic criterion for TCAs.

Plaintiff does claim, however, tha once the criterion for the TCA was established by higher authorities within the FA the scope of the designers' discretion was correspondingly limited and the designer h no discretion to deviate from the criterio given to him, even if he was cloaked with discretion with respect to some issues.

Here, the FAA told the designer that all instrument approaches were to be contained completely within the TCA. Tria Exhibit 25. But one instrument approach w not, and the accident occurred at the exac place where an aircraft on that one instru ment approach passed temporarily outside t TCA.

This case will also provide the Court the opportunity to give guidance to

determine when "the challenged acts of a Government employee - whatever his or her rank - are of the nature and quality that Congress intended to shield from tort liability." Varig at 2765. Here, the employee testified he was aware that he was supposed to include all the turbine approaches within the TCA, but did not. Trial Transcript Vol. X, p.140, l.14-17, and 20-24; p.148, l.13-17; p.161, l.20-25.

Plaintiff introduced both the basic directions provided by the FAA to the designer and a subsequent clarification issued by the FAA, indicating the instrument approach should be completely contained within the TCA. Trial Exhibits 25, 27, and 36.

Yet, both the District Court and the Court of Appeals, seizing on a single word and taking it out of context, found

that complete discretion continued to repose in the designer.

This ignored the distinction between generalized discretion and discretion exercised within parameters. Both lower courts ignored the strictures imposed on the designer by higher FAA authorities, and conferred on the government a generalized immunity.

We note in the interest of candor and for the Court's benefit, that the lower courts interpreted the following language of the directive from FAA headquarters in Washington, D.C. to subordinate air traffic division chiefs, as giving the designer discretion:

> "All Group II TCAs should be implemented in accordance with the following guidelines:
>
> Simplification of the TCA airspace configuration is a prime prerequisite. Vertical and lateral limits should be

standardized where possible and the number of subareas kept to a minimum.

TCA airspace should initially consist of three concentric circles centered on the primary airport, preferably at the VORTAC site if located on the primary airport. The radius of the outer circle should normally be 20 miles with sufficient airspace to contain existing terminal IFR procedures.

This recommended airspace configuration should be developed for TCA candidate locations prior to considering potential alteration resulting from user participation. However, analysis of the terminal area operations may necessitate tailoring the airspace in a different manner depending upon the operational needs at the primary airport and the underlying satellite airports. Wherever possible, VOR radials and DME arcs shall be used to define the boundaries of a TCA and its subareas. It is important, however, that prominent visual landmarks also be considered as aids to the VFR traffic desiring to remain clear of the area."

Trial Exhibit 25 (emphasis supplied).

Clearly, this is a question of law and not fact, for which no deference is owed the lower courts. First, it should be noted that the trial court relied on the ability of the designer to adjust the design of the TCA, taking into account certain criteria relating to the surrounding community, and the specific discretion to exclude certain instrument approaches. Colorado Flying Academy, Inc. v. United States, 506 F.Supp. 1221, 29 (D.Colo. 1981). The Court of Appeals emphasized the word "normally" but found that it modified more than the size, circumference, or radius of the TCA. Colorado Flying Academy, Inc. v. United States, 724 F.2d 871, 76 (10th Cir. 1984). Straining normal English construction, the Court of Appeals apparently found the word "normally" also modified the requirement to contain all instrument approaches

within the TCA. In this regard, both courts ignored the testimony of the designer which showed he understood that all turbine approaches were to be contained within the TCA. Trial Transcript, Vol. X, p.140, l.14-17 and 20-24; p.148, l.13-17. 8R ILS Backcourse was used by turbine aircraft. Trial Transcript, Vol. X, p.149, l.3-6; p.200, l.4-7. Both courts also ignored the fact that the designer could not point to a single FAA directive which authorized him to exclude any portion of 8R ILS Backcourse from the TCA. Trial Transcript, Vol. X, p.199-200.

The courts further ignored an FAA memorandum, dated February 8, 1973, from the Acting Chief, Denver Tower, acknowledging the implementation of Group II TCAs and proposing a design for the Denver TCA. In this memorandum the Acting Chief of the Denver Tower, an FAA employee, asserted

that all of the instrument approach procedures were included within the TCA. Trial Exhibit 26. A clearly erroneous statement as subsequent, tragic events demonstrated.

An apt analogy would be that of an architect. He has discretion in creati a design, in fact he is expected to be creative and different. Yet whatever the design, the architect has no discretion to violate the building code. Here, the language seized upon by the courts clearly shows the designer of the TCA had some discretion in deciding on the shape of the TCA. But in focusing on this language alone, both courts ignored the fact that whatever the shape chosen, the designer ha no discretion to exclude some or all of an instrument approach.

Thus, the Tenth Circuit, even before Varig or Russell v. United States,

763 F.2d 786 (10th Cir. 1985) looked at the whole process - designing TCAs in general - rather than at the complained of act, failing to include all instrument approaches within the adopted TCA.

The position impliedly taken by the Tenth Circuit in Colorado Flying Academy v. United States, 724 F.2d 871 (10th Cir. 1984), and expressly taken in Russell v. United States, 763 F.2d 786 (10th Cir. 1985), joining with the Seventh Circuit position, would clearly emasculate the Federal Tort Claims Act. Every government action would necessarily be found to be discretionary. Then Congress would again be entertaining private bills. Conversely, the Eighth Circuit approach would not always result in liability. See Ostera v. United States, 769 F.2d 716 (11th Cir. 1985), only the just application of the Federal Tort Claims Act.

IV. May the Government Promulgate a Regulation, Which by Its Own Aircraft Near-Collision Studies, Requires the Accomplishment of an Impossible Task and then Assert the Violation of that Regulation as Negligence Per Se, Holding Contributory Negligence Per Se Sufficient to Bar Recovery?

The FAA has promulgated a regulation, 49 C.F.R. § 91.67, which states in part:

> "When weather conditions permit, regardless of whether an operation is conducted under Instrument Flight Rules or Visual Flight Rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft in compliance with this section. . . ." (emphasis supplied).

This is known as the "see and avoid rule".

The District Court held the mere happening of the collision was sufficient proof of the violation of the rule. Colorado Flying Academy, Inc. v. United States 506 F.Supp. 1221 (D.Colo. 1981). The Cour

of Appeals affirmed. Colorado Flying Academy, Inc. v. United States, 724 F.2d 871 (10th Cir. 1984).

Both courts ignored an FAA study placed into evidence (Exhibits 5 and 5a) by the Plaintiff which clearly showed that pilots, even when warned of the potential of conflicting aircraft, were unable to see that other aircraft in time to avoid a collision. The rule is impossible to comply with if it is interpreted to impose an absolute duty not to have a collision and if a collision is then considered absolute proof of the violation.

This very idea offends basic concepts of due process and fair play. The FAA has, if this interpretation is allowed to stand, promulgated a rule which in essence will always relieve the FAA of liability, if the negligence of its controllers has caused

a midair collision. This is because the pilots, by having the collision, have prov they violated the "see and avoid" regulation. Yet the FAA, from its own tests (Exhibits 5 and 5a), knows compliance with the rule is virtually impossible. A bette rule would make the collision no more than prima facie proof; or sufficient only to raise a rebuttable presumption of lack of vigilance, subject to the plaintiffs rebutting the presumption. In fact, the only just application is to require the party seeking to invoke the regulation to have the burden of showing that the offending pilot had the ability to see the conflicting traffic in time to take effective evasive action and failed to do so.

It was only because the courts found this negligence per se that the tria court's failure to make any findings with respect to the negligence of the air traff

controller or his lack of proper certification could be found to be harmless by the Tenth Circuit. This readily allowed the Tenth Circuit also to infer certain findings of fact where they did not exist.

The Supreme Court must act to correct this gross abuse of the rulemaking process. The purpose of rules is to govern people's behavior, not insulate the government against liability for its own negligence.

V. Conclusion

This Court's decision in Varig answered many questions about the application of discretionary function exception to the Federal Tort Claims Act, yet it also left unanswered many other questions. Thus the circuits, in the short time since the Varig decision was rendered, have already begun to take divergent paths in applying

the discretionary function exception. The practical result has been that an injured person's rights, may be totally dependent upon where he is hurt and where he can bri suit, when harmed by government action.

Further, the Seventh Circuit line of decisions when followed, has the absolute effect of immunizing the vast majorit of government actions and employees. This result is at a clear variance with the intent and purpose of the Federal Tort Claims Act, when it was enacted. If the wave of decisions which is engulfing a group of circuits continues unchecked, the exception will swallow the rule. Thus, in the wake of the confusion of the circuits, this is a question of pressing national concern and great national import, which must be decided by this Court.

This case presents that set of ci cumstances which were missing in Varig.

Here the agency had the discretion to act differently or not at all. The FAA chose to act and gave the designer of the TCA several fixed parameters from which he had no authority or discretion to deviate. The designer's unauthorized deviation was negligent and was a proximate cause of the injuries and damages suffered by petitioners.

In the process of resolving these issues, this Court can clearly tell the agencies that Congress controls the scope and extent of governmental immunity from tort liability, and that the violation of agency regulations cannot be used to relieve the agency of responsibility for the actions of its employees. The reprehensibility of this practice is evident when the agency passes a regulation with which it is virtually impossible to comply. The FAA is the regulator of safety in flight. It is charged with the safety of all the flying publics. Its regu-

lations should inure to the benefit of the public, not itself.

DATED this 4th day of February, 1986.

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

COLORADO FLYING ACADEMY, INC., a Colorado corporation; FEDERAL INSURANCE COMPANY, and ASSOCIATED AVIATION UNDERWRITERS,	)	No. 81-1485
Plaintiff-Appellants,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 76-K-351)

L. B. Ullstrom, Denver, Colorado (Edward J. Rau, Denver, Colorado, was also on the brief), for Plaintiffs-Appellants.

Gary W. Allen, Assistant Director, Torts Branch, Civil Division, Department of Justice, Washington, D.C. (Stuart E. Schiffer, Acting Assistant Attorney General, and Joseph F. Dolan, United States Attorney, were also on the brief) for Defendant-Appellee.

Before HOLLOWAY, DOYLE and LOGAN, Circuit Judges

HOLLOWAY, Circuit Judge.

This timely appeal is from a judgment entered for defendant United States of America in an action for damages and indemnification brought under the Federal Tort Claims Act. Colorado Flying Academy Inc. v. United States of America, 506 F.Supp. 1221 (D.Colo.1981) (C.F.A.). The case arose out of a mid-air collision of two aircraft near Stapleton Airport, Denver, Colorado.

I

The factual background

A.

At about 9:30 a.m. on June 21, 1974 -- a clear day with visibility of 60 miles -- a Piper Seneca aircraft (Seneca) owned by

plaintiff Colorado Flying Academy (Academy), collided with a Beechcraft Bonanza (Bonanza) occupied by four persons. The trainee and instructor inside the Seneca ditched in a nearby lake and received only minor injuries. The Bonanza crash-landed in the Crown Hill Cemetery and the four adult occupants died.

The Academy operates a flying school and used the Seneca in teaching instrument flight procedures. On the morning of the collision, trainee James Allen was seeking advance instrument training.[1] He sat in the left seat and wore a hood, designed to limit his vision to the aircraft's instrument panel. The instructor, Brian Gardner,[2] sat in the right hand seat. Mr. Allen was practicing Instrument Landing System (ILS)[3] approaches on runway 8R.[4] This particular approach is a published Instrument Approach Procedure, designed by

the Federal Aviation Administration (FAA), known as the 8R ILS Back Course Approach. Id. at 1226. The Seneca had requested the air controller, Richard Igel, to position the aircraft on the final approach course, and just prior to the collision the Seneca had been cleared for an 8 R ILS back course approach. Id. The instructor, Mr. Gardner, was the pilot in command. Id. at 1223.

The Bonanza was flown by its owner, George Carter.[5] His wife and her parents, the Hoffmans, were passengers. The Carters and Hoffmans were flying from Williams, Arizona, to Boulder, Colorado, under visual flight rules (VFR).[6] Their altitude was approximately 7,900 feet above mean sea level (MSL).[7] They were not receiving any assistance from air traffic controllers,[8] and their plane was not equipped with a transponder. The

Bonanza could be seen by radar, although "for a very brief time, it may have been off the screen as a result of tangential loss." C.F.A., 506 F.Supp. at 1227.

The Federal Aviation Act of 1958, 49 U.S.C. § 1348, empowers the FAA to regulate navigable airspace. In carrying out this responsibility, the FAA created terminal control areas (TCAs) in various locations throughout the country. The TCA surrounding Denver's primary airport, Stapleton International Airport, was established as of March 28, 1974 by a Federal Aviation Regulation (FAR). C.F.A. supra, 506 F.Supp. at 1226. The TCA is intended to reduce the danger of midair collisions, in part by separating controlled and uncontrolled air traffic. With minor exceptions, only controlled air traffic is allowed within a TCA. According to an FAA information release of

March 26, 1968 (Plaintiffs' Exhibit 39), the TCA program would "minimize pilot reliance on the 'see and avoid' concept of separation and ... eliminate the unknowns ... so that aircraft landing at the major hub airports not only are segregated from all other aircraft but also are provided with separation by the air traffic control system." Id. at 2.

Although general guidelines regarding TCA design were given by the FAA from Washington, D.C., the task of tailoring the Denver TCA configuration fell to Gerald Wilson, an FAA Airspace Specialist for the Rocky Mountain Region. After proposals, public comment and revisions, the TCA design in effect at the time of this accident was determined. Generally, the Denver TCA can be visualized as a group of three cylinders, each having its center at Stapleton airport. At the time of the

collision, the first cylinder reached from the ground to 8,000 feet MSL and extended radially from Stapleton for a distance of nine miles. The second cylinder was from 8,000 feet to 10,000 feet MSL with a radial distance of fifteen miles. The third cylinder reached from 10,000 feet to 11,000 feet MSL and extended radially for twenty miles. The interiors of these cylinders form the TCA. See Appendix.

Just prior to the collision, the Seneca was cleared for final approach on the 8R ILS Back Course Approach. The glide slope for this approach caused the Seneca to descend below the floor of the TCA's second cylinder (8,000 MSL) briefly before re-entering the TCA boundary at a distance of nine miles from Stapleton Airport. See Appendix. Meanwhile the Bonanza was passing through Denver without entering the TCA. It was flying just under the

floor of the second cylinder (about 7,900 feet MSL) and outside the nine mile radius of the TCA's first cylinder. As the district court noted, traffic avoiding the TCA is compressed by the 8,000 foot MSL shelf of the TCA and the 6,900 foot MSL minimum altitude for flight over Denver. During the brief period as the Seneca dropped out of the TCA on the 8R ILS Back Course Approach, the Bonanza flew toward the Seneca's starboard side. The Bonanza struck the Seneca "at a horizontal angle of approximately 40½ to 60½ to the right, as measured from straight ahead." Id. at 1227. Mr. Allen and Mr. Gardner, who thought they had struck a bird, see id. at 1224-25 n. 1, received only minor injuries in ditching the Seneca in a nearby lake. All occupants of the Bonanza died in a crash-landing.

B.

Plaintiff Academy and the insurance company plaintiffs brought this action under the Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2671 et seq. They seek $471,000, representing $81,000 for the loss of the Seneca and $390,000 in settlement payments made to heirs of the occupants of the Bonanza, the Carters and the Hoffmans.[9]

The United States defended primarily on the grounds of the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. §§ 2680(a) and (h). The Government also argued that the pilots' negligence barred recovery. I R. 22-29.

The district court denied any relief to plaintiffs concluding, primarily, that negligence on the part of pilots Carter and Gardner as well as the discretionary

function exception of 28 U.S.C. § 2680(a) required judgment for the Government. The court found that there was Government negligence in designing, establishing and maintaining the Denver TCA and failing to provide a horizontal and vertical buffer zone for the TCA. C.F.A., 506 F.Supp. at 1227. Such design negligence was "a proximate cause" although not "a primary cause" of the mid-air collision. Id. This negligence was not actionable, however, because it came within the discretionary function exception. Id. at 1229. The policy decision as to which instrument approach procedure should or should not be contained within the TCA is a decision which is incident, or directly related to, the attainment of the objectives sought by the creation of the TCA. Id.

Whether the trial court made findings

regarding the negligence of the air traffic controller is disputed by plaintiffs on appeal. As we will explain, we believe that the trial court held that there was no air traffic controller negligence, and made sufficient findings on this issue which are not clearly erroneous. Furthermore, we conclude that the trial court correctly applied the discretionary function exception. Accordingly, we affirm.

II

The design of the Denver Control Area

We consider the discretionary function exception first because overcoming this hurdle is "a jurisdictional prerequisite to suit." Baird v. United States, 653 F.2d 437, 440 (10th Cir.), cert. denied, 454 U.S. 1144 (1981). This exception insulates the United States from liability for the performance, or failure to per-

form, a discretionary function even if th discretion is abused. 28 U.S.C. § 2680(a

Plaintiffs contend that the Government' negligence in designing, establishing, an maintaining the Denver TCA is not within the scope of the discretionary function exception because the 8 R ILS Back Course Approach was not fully contained inside the TCA in contravention of specific guidelines set forth in FAA directives. Brief of Appellants at 7. This, plaintiffs argue, created a mandatory duty to contain the instrument approach within th TCA, and the negligent failure to carry out that duty is not within the exception. See Jackson v. Kelly, 557 F.2d 735, 737-3 (10th Cir. 1977) (en banc). If such mandatory guidelines existed and they were violated, then the discretionary function exception would not bar recovery. See Barton v. United States, 609 F.2d 977, 97

(10th Cir. 1979); First National Bank in Albuquerque v. United States, 552 F.2d 370, 375-76 (10th Cir.), cert. denied, 434 U.S. 835, (1977); Griffin v. United States, 500 F.2d 1059, 1066-69 (3rd Cir. 1974). Thus, our inquiry must begin with the various regulations and directives to determine if they created a mandatory duty to design a TCA in a particular manner.

There is substantial evidence demonstrating that no such mandatory duty existed. Plaintiffs' own evidence supports this conclusion. For example, plaintiffs refer to a communication from the FAA to subordinate Air Traffic Division Chiefs which states in part:

> All Group II TCAs should be implemented in accordance with the following guidelines:
>
> Simplification of the TCA airspace configuration is a prime prerequisite. Vertical and lateral limits should be standardized where possible and the number of subareas kept to a minimum.

> TCA airspace should initially consist of three concentric circles centered on the primary airport, preferably at the VORTAC site if located on the primary airport. The radius of the outer circle should normally be 20 miles with sufficient airspace to contain existing terminal IFR procedures.
>
> This recommended airspace configuration should be developed for TCA candidate locations prior to considering potential alteration resulting from user participation. However, analysis of the terminal area operations may necessitate tailoring the airspace in a different manner depending upon the operational needs at the primary airport and the underlying satellite airports. Wherever possible, VOR radials and DME arcs shall be used to define the boundaries of a TCA and its subareas. It is important, however, that prominent visual landmarks also be considered as aids to the VFR traffic desiring to remain clear of the area.

Plaintiffs' Exhibit 25 at 1 (emphasis added).

Use of the word "normally" in the emphasized portion of the communication indicates that there was some latitude in the design of the TCAs. See XIV R. 148. The communication as a whole contemplates that the TCAs can be tailored, depending on the needs of a particular location. The

emphasized language illustrates the discretionary quality of TCA design. Hence we feel that this FAA communication did not create a fixed or readily ascertainable standard from which a deviation would be actionable. Rather, by its own terms, it called for interest-balancing and tailoring to meet local conditions. See Miller v. United States, 710 F.2d 656, 662-66 (10th Cir. 1983) (petition for cert. filed).[10]

Furthermore, the record reveals that the design of the Denver TCA was determined after analysis of competing aviation needs. Those who sought to maximize safety wanted a larger TCA, and those who objected to the inconvenience the TCA would cause wanted either a smaller TCA or none at all. See Public Hearing on Notice of Proposed Rule Making 69-41 (January 7, 1970) at 3-6, 54-55, Defendant's Exhibit

16. The impact on all users had to be balanced in designing and maintaining the Denver TCA. See Id., XIV R. 135 (testimony of Gerald Wilson, Denver TCA designer).[11]

We are convinced that these administrative decisions fall within the discretionary function exception. Competing interests were weighed and then policy decisions were made which the exception was intended to cover. Miller v. United States Department of Transportation, supra, 710 F.2d at 665-66; First National Bank in Albuquerque v. United States, supra, 552 F.2d at 375-76. Therefore we find no error in the ruling of the district court that the claim of Government negligence in designing the Denver TCA must be rejected because the Government decisions in question are within the discretionary function exception of §2680(a).

III

The conduct of the air traffic controller

We now turn to plaintiffs' argument that the trial court failed to make findings regarding the negligence of the air traffic controller. Plaintiffs reason that the trial court indicated it would make findings in the same sequence as the issues were entered in the pretrial order. C.F.A. supra, 506 F.Supp. at 1226. In the pretrial order, the eleventh contested issue of fact and law contained a number of issues including whether there was air controller negligence. I R. 41.[12] There were not, however, specific findings discussing the particulars of the claim of negligence by the air traffic controller, although there were some findings about the radar surveillance.[13] Because of the lack of detailed findings on their specifications of negligence by the air traffic

controller, the plaintiffs argue that the court failed to make findings as required under Rule 52(a), Fed.R.Civ.P. 52(a).

Rule 52(a) provides that in actions tried without a jury "the court shall find the facts specially and state separately its conclusions of law thereon ...." Id. The Rule is designed to provide the appellate court with a clear understanding of the basis of the trial court's decision and to aid the trial court in considering and adjudicating the facts. Ramey Construction Co. v. Apache Tribe, 616 F.2d 464, 466-67 (10th Cir. 1980); Featherstone v. Barash, 345 F.2d 246, 249 (10th Cir. 1965); 9 C. Wright & A. Miller, Federal Practice And Procedure § 2571 at 679-80 (1971).[14]

To meet the burden that Rule 52(a) imposes, there must be findings either in the opinion or stated elsewhere that are

sufficient to indicate the factual basis for the ultimate conclusion. See Kelley v. Everglades Drainage District, 319 U.S. 415, 422, (1943); Snyder v. United States, 674 F.2d 1359, 1363 (10th Cir. 1982). This does not require inordinately detailed findings. See Nulf v. International Paper Co., 656 F.2d 553, 561 (10th Cir. 1981). Featherstone v. Barash, 345 F.2d 246, 250 (10th Cir. 1965), Woods Construction Co. v. Pool Construction Co., 314 F.2d 405, 406 (10th Cir. 1963). The Supreme Court articulated the general standard for the findings in Kelley v. Everglades Drainage District, supra, 319 U.S. at 415:

> It may be that adequate evidence as to these matters is in the present record. On that we do not pass, for it is not the function of this Court to search the record and analyze the evidence in order to supply findings which the trial court failed to make. Nor do we intimate that findings must be made on all of the enu-

> merated matters or need be made on no others; the nature of the evidentiary findings sufficient and appropriate to support the court's decision as to fairness or unfairness is for the trial court to determine in the first instance in the light of the circumstances of the particular case. We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion.

Id. at 421-22. (emphasis added).

We believe that the findings were sufficient to discern the basis for the trial court's decision on the claim of negligence by the air traffic controller. In the section of the opinion entitled "Conclusions of Law" the court stated that "an air traffic controller has the right to rely upon the assumption that a pilot knows and will abide by the applicable Federal Aviation Regulations." C.F.A., 506 F.Supp. at 1228. This must be considered with the conclusion that the Seneca and Bonanza pilots "each failed to

maintain the level of vigilance required of pilots by the Federal Aviation regulations and by good operating practice." C.F.A., 506 F.Supp. at 1228.[15] The judge's reasoning is apparent that the controller was therefore not at fault. Moreover the trial judge's opinion stated the general nature of the claims of the parties and these included allegations of failure to maintain the radio equipment properly, FAA failure to direct the plaintiffs' aircraft out of danger, and failure to advise plaintiffs that other aircraft was in dangerous proximity. Id. at 1223. Then the trial judge's findings tracked the outline of the pretrial order where questions of negligence were set out in paragraph 11, I R. 41, and the judge made the findings of the detailed negligence which he did find, as quoted in note 15. supra. It is clear, we feel, that the

findings thus rejected the other claims of negligence alleged.

We are satisfied that the findings of fact were sufficient on the claims of negligence by the air traffic controller. They rejected the claims of negligence by the controller and the findings are amply supported by the record. There is conflicting evidence between the testimony of plaintiffs' expert McDermott, X R. 32 et seq., and the testimony of the air traffic controller, Mr. Igel, XIV R. 44-125, explaining and defending his actions, and the testimony of the Government expert Rowan who testified that the performance of the air traffic controller in no way contributed to the accident. XV R. 216 et seq. We feel that the findings are not clearly erroneous.

We have considered Deweese v. United States, 576 F.2d 802 (10th Cir. 1978), and

Yates v. United States, 497 F.2d 878 (10th Cir. 1974), relied on by plaintiffs, and these opinions did uphold awards against the Government based on air traffic controller negligence. We feel these cases are specific fact situations which are distinguishable and that the principles applied in them are not inconsistent with our conclusions here.

In sum, we conclude that there was no error here in the findings against the plaintiffs on the claim of negligence by the air traffic controller.

IV

The claims for indemnity and for direct recovery for negligence against the United States

The plaintiffs argue that the trial court seriously erred in finding that recovery was barred by reason of the contributory negligence of the pilots, Gardner and Carter; that the plaintiffs

are not seeking recovery under any assignment of claims from the Carter and Hoffman heirs, which might cause the pilots' negligence to be charged to plaintiffs; and that their claims for recovery on principles of indemnity should prevail due to the primary negligence by the Government through the acts of the air traffic controller and the FAA design of the Denver TCA contrary to specific guidelines.

Before analyzing these additional claims of error it is important to make clear that recovery is sought by plaintiffs for two distinct types of damages. First, plaintiffs seek compensation for the loss of the Academy's Seneca airplane. Second, they seek to recover sums reasonably paid in settlements with the heirs of the occupants of the Bonanza. Theoretically, plaintiffs could recover directly from the

United States on a negligence claim for the loss of the Seneca. The other damages are different and plaintiffs seek to recover the amounts paid as reasonable settlements with the Carter and Hoffman heirs under indemnity principles on the theory that the Government is primarily liable due to its primary negligence.

A. Contributory negligence

In effect, plaintiffs argue that the trial court erroneously barred recovery because of plaintiffs' contributory negligence. Plaintiffs reason that the trial court relied on a decision that predated Colorado's adoption of a comparative negligence statute,[16] and that this statute applies to the instant action. We agree that the Colorado comparative negligence statute applies, but we need not decide whether the trial court's decision is consistent with the statute.

We reach this conclusion because we can affirm on any grounds that find support in the record. E.g., Mountain States Natural Gas Corp. v. Petroleum Corp. of Texas, 693 F.2d 1015, 1020 (10th Cir.1982); Cayce v. Carter Oil Co., 618 F.2d 669, 677 (10th Cir. 1980); Keyes v. School District No. 1, Denver, Colorado, 521 F.2d 465, 472-73 (10th Cir. 1975), cert. denied; 423 U.S. 1066, (1976). As we have already discussed, we agree with the trial judge that any negligence in designing, establishing and maintaining the Denver TCA is within the discretionary function exception and that the trial court made adequate findings, which we sustain, that there was no air traffic controller negligence. Thus, regardless of whether the court misapplied Colorado's comparative negligence rules, there is no actionable Government negligence[17] and plaintiffs

cannot recover.[18] Hence any error in the findings on the basis of a bar due to contributory negligence is of no consequence.

B. Indemnity

As we have already explained, we conclude that we should uphold the trial court's rulings that there was no actionable Government negligence. Thus again, we should affirm the judgment even if there were an infirmity in the trial court's reasoning on the indemnity issue. Nevertheless, we have considered the trial court's ruling that the plaintiffs do not have a right to indemnity under Colorado law and find no error in that conclusion.[19]

Although plaintiffs argue that they should be indemnified because the Government is primarily liable, their position is not well taken. The trial

judge's analysis and conclusions dispose of this claim. He found that the negligence in design of the TCA was "not a primary cause" of the collision, although the design negligence was found to be "a proximate cause" of the collision. C.F.A., 506 F.Supp. at 1227. Moreover, we feel that the trial judge's opinion adequately found that there was no air traffic controller negligence. On the other hand the negligence of Gardner, the Academy's flight instructor, was found to be "a primary cause" of the mid-air collision, as was the negligence of Carter. Id. Under Colorado law a tortfeasor is entitled to indemnity only where he is secondarily liable and he seeks recovery from one who is primarily liable. See Ringsby Truck Lines, Inc. v. Bradfield, 563 P.2d 939, 942-43 (Colo. 1977); Millenson v. Department of Highways, 590

P.2d 979, 982 (Colo.Ct.App. 1978); Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 517 P.2d 406, 414-15 (Colo.Ct.App. 1973). Thus the findings of the trial judge, which we sustain, support the judge's conclusion that the plaintiffs are not entitled to indemnity.

V

Conclusion

For the reasons stated, we are convinced that the plaintiffs have not demonstrated any reversible error in the findings and conclusions of the trial court. Accordingly the judgement is AFFIRMED.

diagram depicts Denver TCA

Footnotes

1. The district court found that Mr. Allen "held an airplane transport pilot certificate for single engine land flight instructor, single and multi-engine land

airplane ratings, instrument flight instructor, and a helicopter instructor rating. He had accrued approximately 2,500 hours of flight time." C.F.A., 506 F.Supp. at 1225.

2. Mr. Gardner, CFA's Chief Flight Instructor, held an "FAA commercial certificate, with flight instructor, instrument, single and multi-engine land airplane ratings. He had accrued approximately 4,500 hours of flight time." C.F.A., 506 F.Supp. at 1225.

3. The ILS is a navigation aid which provides the pilot with course and elevation information in relation to the runway by a cockpit instrument displaying a vertical needle showing deviation from course and a horizontal needle showing deviation from the planned glide path, or elevation.

4. Runway 8R refers to runway eight right which has a magnetic course of 080 degrees

east from magnetic north.

5. "Mr. Carter held an FAA private certificate with airplane single engine land ratings and had accrued approximately 650 hours of flight time." C.F.A., 506 F.Supp. at 1225.

6. The Bonanza was uncontrolled traffic in that it was operating VFR, was outside the terminal control area of Stapleton Airport, and was not in radio contact with, or controlled by, air traffic facilities. VFR pilots are essentially operating independently, absent communication with traffic control. Thus, their intentions are not known.

7. 7,900 feet above MSL would be approximately 2,620 feet above the ground in the Denver area.

8. Pursuant to stipulations of facts, the district court noted that the Bonanza's last known contact with any FAA facility

was in New Mexico and that "there is no record of radio contact by [the Bonanza] with FAA in Colorado or with Denver Approach Control or Denver Tower." C.F.A., 506 F.Supp. at 1226.

9. Plaintiffs also sought damages for money paid to Crown Hill Cemetery, for aircraft salvage, for the Bonanza's destruction and certain other miscellaneous costs. Plaintiffs did not make administrative claims for these damages. Under Section 2675(a), 28 U.S.C., denial of an administrative claim is a jurisdictional prerequisite before a claimant can bring suit in district court. Lurch v. United States, 719 F.2d 333, 335 n. 3 (10th Cir.1983); Three-M Enterprises v. United States, 548 F.2d 293 (10th Cir.1977). Therefore, an action for these damages cannot be maintained.

The complaint alleged that the United

States, through the FAA, was negligent by: (1) establishing the Denver TCA without fully containing the 8R ILS Back Course Approach within the TCA's boundaries; (2) failing to provide a "buffer zone" surrounding the TCA to enhance separation between controlled and uncontrolled traffic; (3) failing to establish a corridor over the Denver TCA to avoid compression of traffic around its edges; (4) having insufficient numbers of controllers on duty; (5) failing to maintain properly the radar equipment; (6) failing to observe the Bonanza visually and warn the Seneca, and; (7) placing the Seneca "where it was at hazard with conflicting traffic. I R. 8-9.

Plaintiffs also contended that the radar controller was negligent by: (a) failing to devote full attention to the radar scope; (b) failing to monitor the

Bonanza; (c) maladjusting the radar equipment resulting in improper range and intensity of the scope; (d) vectoring the Seneca outside the TCA, and; (e) failing to warn the Seneca. Id. at 10. Plaintiffs prayed for a determination of the degree or percentage of negligence of each of the parties involved, including the FAA, under the Colorado comparative negligence statute. See Colo.Rev.Stat. §13-21-111(1973).

10. Plaintiffs also refer to a memorandum dated February 8, 1973, from the Acting Chief of the Denver Tower describing the proposed Denver TCA. This memorandum states in part: "Proposed floors of the TCA provide for containment of IFR arrivals in TCA airspace to touchdown in all approach configurations." Plaintiffs' Exhibit 26 at 1. We note that this memorandum was issued more than 16 months before actual

implementation of the TCA. Actual implementation required public comment and an evaluation of general aviation interests, commercial air carrier interests, the traffic needs of small aircraft as well as large turbine-powered aircraft, and consideration of the demands of aviation lobbying organizations. See, e.g., XIV Tr. 149, 169, 172.

11. The following findings of the trial court indicate the policy-making involved:

> The functions performed by airspace specialists, like Mr. Wilson, in planning and designing the TCA configuration for a specific location involve judgment, planning and policy-making discretionary activities. They are therefore protected from tort claims. The policy decision as to which instrument approach procedure should or should not be contained within the TCA is a decision which is incident, or directly related to, the attainment of the objectives sought by the creation of the TCA. The decision by the FAA not to provide for "buffer zones" or VFR corridors in TCA design is a policy judgment of the agency falling within the protec-

tion of the discretionary function exception.

C.F.A., 506 F.Supp. at 1229.

12. The portion of the pretrial order at issue provided:

> 11. Was the Defendant United States negligent in any of the following respects:
>
> * * *
>
> d. In that the FAA failed to properly maintain and operate the radar equipment utilized?
>
> e. Was the radar approach controller negligent in failing to provide adequate separation between the aircraft?
>
> f. Was the radar approach controller negligent for failing to direct the Seneca out of danger?
>
> g. Was the radar approach controller negligent for failing to perceive a radar target for the Bonanza and to warn the Seneca of the conflicting traffic of the Bonanza?
>
> h. Was the radar approach controller negligent in vectoring the Seneca at an altitude unprotected by the Denver TCA?
>
> i. Was the radar approach controller negligent in placing the Seneca at an altitude which did not provide five hundred (500) feet vertical separation from conflicting uncontrolled traffic

permitted to travel outside the Denver TCA?

j. In permitting the certification of the Seneca with such a large door post "blind spot?"

I R. 41.

13. The district court did make the following findings on the radar surveillance along with its findings on Government negligence with respect to the TCA:

7. The Denver terminal radar was operating properly immediately prior to and at the time of the mid-air collision.

8. The FAA was not negligent in maintaining the Denver terminal radar system.

* * *

10. The radar surveillance provided by the Defendant United States in the Denver TCA was adequate.

11. The Defendant United States was negligent in the following respects:

a. In designing and establishing and maintaining the Denver TCA.

b. In failing to provide a "buffer zone" horizontally and vertically in the

> Denver TCA to provide separation between controlled and uncontrolled traffic as they conflict near the boundary.
>
> 12. The defendant was negligent in establishing procedures that did not provide a minimum of 500 feet vertical separation for TCA traffic from non-TCA traffic.

C.F.A., 506 F.Supp. at 1227.

14. Both Featherstone and Wright & Miller point out that an additional purpose behind Rule 52(a) is to make definite what has been decided so the doctrines of collateral estoppel and res judicata can be applied.

15. As the parties' briefs make clear, there are three FARs of importance to the issues on appeal. The "see and avoid" concept is set forth at FAR 91.67(a), 14 C.F.R. §91.67(a) (1975):

> When weather conditions permit, regardless of whether an operation is conducted under Instrument Flight Rules or Visual Flight Rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft in compliance with this sec-

tion. When a rule of this section gives another aircraft the right of way, he shall give way to that aircraft and may not pass over, under, or ahead of it, unless well clear.

General provisions of pilot authority are found at FAR 91.3(a)(b), 14 C.F.R. §§ 91.3(a)(b) (1975):

> The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.
>
> In an emergency requiring immediate action, the pilot in command may deviate from any rule of this subpart or of Subpart B to the extent required to meet that emergency.

Finally, the right-of-way rules pertinent to aircraft on landing approaches are set forth in FAR 91.67(f), 14 C.F.R. §91.67(f) (1975):

> Aircraft, while on final approach to land, or while landing, have the right of way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right of way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land, or to overtake that aircraft.

16. The district court stated that under Colorado law, a violation of a statute or ordinance is negligence as a matter of law, and that if such negligence proximately causes the injury, the offender cannot recover. We recognize, as plaintiffs point out, that in reaching this conclusion the district court cited Reed v. Barlow, 153 Colo. 451, 386 P.2d 979, 981 (1963) which antedated Colorado's adoption of a comparative negligence rule. Although we are puzzled by this, we need not decide whether the court failed to make the proper comparative negligence analysis under Colorado law.

In passing, we note that it might be possible to construe the district court's opinion so that it is consistent with Colorado's comparative negligence statute. Colorado's comparative negligence statute permits recovery only if the plaintiff's

negligence "was not as great as the negligence of the person against whom recovery is sought." Colo. Rev. Stat. § 13-21-111 (1973). As explained in Part III, we view the district court's opinion as finding no negligence by the air traffic controller. The court found that the design negligence of the United States was "a proximate cause" of the collision, though not "a primary one." C.F.A., supra, 506 F.Supp. at 1227. Further the court found that the negligence of Gardner and of Carter was "a primary cause" of the mid-air collision. Id. This could be read to mean that the neglience of plaintiffs is greater than any negligence on the part of the defendant, barring recovery under the Colorado statute. See Graf v. Tracy, 568 P.2d 467 (Colo. 1977).

The district judge did not express the degree of each person's negligence as a

percentage. The pretrial order states that one contested issue of fact and law was whether the Seneca pilots were negligent, and if so, the percentage of their negligence compared to that of the Government. I R. 42. Moreover, Colorado's comparative negligence statute also specifies that the court determine the degree of negligence expressed as a percentage. Colo. Rev. Stat. § 13-21-111(2)(b) (1973). We need not decide whether there was any error on this score. As explained in the text, we can affirm on a ground not involving any comparison of the negligence of different persons.

17. We also note the district court found that the Denver Terminal radar was operating properly before and at the time of the collision, and that the FAA was not negligent in maintaining this radar. C.F.A., supra, 506 F.Supp. at 1227.

18. Plaintiffs also complain that the negligence of the Bonanza pilot should not have been imputed to them. We do not believe it necessary for us to express a view on this point. As we have explained, we are upholding the trial court's rulings that there was no actionable Government negligence.

19. "The Federal Tort Claims Act permits an indemnity action against the United States 'in the same manner and to the same extent' that the action would lie against 'a private individual in like circumstances' . . . ." Lockheed Aircraft Corp. v. United States, 51 U.S.L.W., 4206, 4208, ___ U.S. ___, ____, (U.S. February 23, 1983) (citations omitted).

Indemnity actions are permitted under Colorado law. See Ringsby Truck Lines, Inc. v. Bradfield, 563 P.2d 939, 942-43 (Colo. 1977).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 76-K-351

COLORADO FLYING ACADEMY, INC., a Colorado corporation; FEDERAL INSURANCE COMPANY, and ASSOCIATED AVIATION UNDERWRITERS, Plaintiffs, vs. THE UNITED STATES OF AMERICA, Defendant.	MEMORANDUM OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTORY STATEMENT

This action arises out of a mid-air collision between two aircraft over Denver, Colorado. Plaintiffs' aircraft, a twin-engine Piper Seneca, N-774, was struck by a single engine Beech Bonanza, N-27R. All four occupants of the Bonanza died when it crashed into the Crown Hill

Cemetery. The pilot and student-pilot aboard the Seneca received only minor injuries after ditching their disabled aircraft in Sloans Lake.

The collision occurred in clear weather, at approximately 9:36 A.M. on June 21, 1974. The Seneca, owned and operated by Colorado Flying Academy, was being flown on an instrument procedures training flight, utilizing the radar and instrument approach facilities operated by defendant at Stapleton International Airport, Denver. At the time of the collision, the Seneca was under the control of a radar approach controller, employed by the Federal Aviation Administration in the air traffic control facility at the Stapleton control tower. The Bonanza, being flown by the owner, a resident of Arizona, was operating under visual flight rules, and had nearly

reached its destination airport at Boulder, Colorado, after departing Williams, Arizona, earlier in the day.

Plaintiffs' initial complaint alleging negligence on the part of defendant sought $81,000 money damages for the loss of the Piper Seneca aircraft. Later, the survivors of the deceased occupants of the Bonanza made demand on the plaintiff, Colorado Flying Academy, to pay wrongful death damages totaling $1.3 million. Plaintiff, Colorado Flying Academy, and the insurance company plaintiffs, while denying negligence and claiming that the Federal Aviation Administration was responsible, settled these demands for $390,000. Following this settlement plaintiffs amended their complaint to pray for judgment in the total sum of $471,000, representing the $81,000 aircraft loss and the $390,000 paid to the Bonanza sur-

vivors. During the trial, after the testimony of Shields B. Craft, plaintiffs' claims adjuster, the prayer was amended to include $4,621.25 for damages paid to Crown Hill Cemetery, $325.00 for aircraft salvage paid to J. W. Duff, $2,000 medical payments to the heirs of the deceased occupants of the Bonanza, $14,000 for the Bonanza's destruction and $8,751.04 for related attorney fees. No administrative claims were ever filed for these latter amounts.

JURISDICTION

The Court has jurisdiction pursuant to the Federal Tort Claims Act. The amount in controversy exceeds, exclusive of interest and costs, the sum of TEN THOUSAND DOLLARS ($10,000.00).

GENERAL NATURE OF THE CLAIMS OF THE PARTIES

1. Plaintiffs claim:

(a) The FAA designed and maintains the Denver Terminal Control Area (TCA) for the sole purpose of separating aircraft and preventing collisions. The FAA designed the Denver TCA in a faulty manner in that the TCA did not cover an area and altitude that would include the Instrument Landing System (ILS) approach, or, conversely, designed and failed to modify the ILS 8R procedure to match the TCA and thus give adequate protection to aircraft under radar control, from conflicting unknown traffic "compressed" under the TCA "shelf."

(b) Plaintiffs' aircraft, on an instrument practice flight under positive radar control, was being vectored by radar by the Denver Tower Approach controller and

had been cleared for final approach to landing, thus had the right-of-way over all other aircraft, under Federal Aviation Regulations, 14 CFR §91.67(f).

(c) The FAA failed to maintain properly the radar equipment employed to provide separation for aircraft.

(d) The FAA failed to direct the plaintiffs' aircraft out of danger and failed to advise the plaintiffs of the fact that the other aircraft was in dangerous proximity although the FAA gave warnings to other aircraft of conflicting non-transponder traffic.

(e) The FAA failed to maintain adequate separation (500 feet vertically) between plaintiffs' aircraft and other conflicting traffic, which traffic was "compressed" in the narrow corridor under the "shelf" of the TCA.

2. The defendant generally denies the allegations of plaintiffs and asserts that plaintiffs fail to state a claim upon which relief can be granted and that as to at least part of plaintiffs' claims the court is without jurisdiction pursuant to the discretionary function and misrepresentation exceptions of the Federal Tort Claims Act, 28 U.S.C. §2680(a) and (h), particularly with regard to the allegations concerning the establishment and design of the Denver TCA, the establishment of the ILS BC 8R approach to Stapleton Airport, and the issuance of Type Certificates. Defendant further asserts that plaintiffs are not the real parties in interest; that plaintiffs were negligent per se or contributorily negligent in failing to see and avoid the aircraft with which its pilot and student collided; and that plaintiffs voluntarily

assumed the known risk of harm in operating the aircraft. Defendant further asserts that the plaintiffs are estopped to deny negligence because they entered into a voluntary settlement with the survivors of the deceased occupants of the other aircraft involved in this mid-air collision and further that there is no rule of contribution or indemnity applicable that will permit recovery from defendant of that settlement amount.

STIPULATIONS

Following conferences between counsel for the parties, held pursuant to the request of the court, the following stipulations were agreed upon and are considered to be facts:

1. That the subject aircraft Seneca 774 was in the control and possession of Colorado Flying Academy, Inc. (hereinafter referred to as CFA); that Brian Gardner

was the pilot in command of said aircraft at the time of the accident and that Brian Gardner was acting within the scope and authority of his employment for CFA at the time of the accident. Further, that the aircraft was owned by CFA with a security interest held by Piper Finance Company at the time of the accident.

2. That the weather at the time and place of the accident was as stated in the NTSB accident report, to wit: daylight, clear, and visibility 60 miles. Further, that weather was not a contributing cause of the accident.

3. That the FAA was the agency responsible for the design, construction, implementation and establishment of procedures for the Denver Terminal Control Area and for the Instrument Approach Procedures for Stapleton International Airport.

4. That the transcript by Frank McDermott of Denver Tracon Terminal Radar South, June 21, 1974, 1502-1555 GMT, is a substantially accurate representation of the radio communications between Denver Terminal Radar South and aircraft with which it was communicating.

5. That the transcript of Susan M. Hytinen, dated January 6, 1978, is a substantially accurate representation of the radio communications between Denver Terminal Radar South position and various aircraft with which it was communicating between the hours of 1531:40 GMT and 1538:30 GMT on June 21, 1974[1].

6. That the collision occurred just below the 8,000-foot shelf (approximately 7,900 MSL) and at a point just west (within one mile) of the nine-mile boundary of the Denver TCA.

7. That plaintiff CFA is a Colorado corporation, is a citizen of the State of Colorado engaged in the business of flight instruction, and is located at Arapahoe County Airport.

8. That the Federal Aviation Administration (hereinafter referred to as FAA) is an instrumentality or agency of the United States government as defined by 28 USC §2671.

9. That the plaintiff CFA conducts a flying school for pilot-trainees seeking instrument or multi-engine ratings in aircraft, from the Arapahoe County Airport.

10. That the Federal Aviation Act of 1958 authorizes the Federal Aviation Administrator to regulate the use of navigable airspace by assignments thereof (49 U.S.C. §1348(a)); to prescribe air traffic rules (49 USC §1348(c)); and to pro-

mulgate other substantive rules in addition to operating the air traffic control system.

11. That plaintiff CFA's employee and Chief Flight Instructor, Brian Gardner, held an FAA commercial certificate, with flight instructor, instrument, single and multi-engine land airplane ratings. He had accrued approximately 4,500 hours of flight time. His trainee, pilot James Allen, held an airplane transport pilot certificate for single engine land flight instructor, single and multi-engine land airplane ratings, instrument flight instructor, and a helicopter instructor rating. He had accrued approximately 2,500 hours of flight time.

12. That FAR 61.45 requires an applicant, for any flight test involving flight maneuvers solely by reference to instruments, to furnish equipment that excludes

the visual reference of the applicant outside of the aircraft and that, inasmuch as trainee-pilot Allen on the instant flight was practicing for such a flight test, the wearing of a "hood" or view-limiting device by Allen at the time of the collision was in keeping with normal and accepted practice and procedure. Further, that when an aircraft is being flown in simulated instrument flight, FAR 91.21(b) requires that an appropriately-rated safety pilot have adequate vision forward and to each side of the aircraft or have a competent observer in the aircraft to supplement adequately the vision of the safety pilot.

13. That the other aircraft involved, a white, yellow and brown Beechcraft Bonanza, M-35, N-9727R, from Williams, Arizona, was flown by George Carter, accompanied by his wife, Elizabeth, and

her parents, George and Hortense Hoffman. Mr. Carter held an FAA private certificate with airplane single engine land ratings and had accrued approximately 650 hours of flight time.

14. That the Bonanza N-9727R had departed Williams, Arizona, at approximately 06:20 MDT (12:20 GMT) on a VFR flight plan via Farmington, Alamosa, Walsenberg, Pueblo, direct to Boulder Municipal Airport, which is three miles north of the City of Boulder. That the last known contact of N-9727R with any FAA facility was at Farmington, New Mexico, and that there is no record of radio contact by N-9727R with FAA in Colorado or with Denver Approach Control or Denver Tower. Further, Carter's VFR flight plan indicated that his planned true airspeed was 160 knots, his planned cruising altitude was 8,500 feet MSL and the aircraft was

not equipped with a transponder.

15. That the FAA designed the Instrument Approach Procedures for the 8 Right ILS approach to Stapleton International Airport and that said procedures were published and distributed under auspices of the U.S. Government.

16. That the deceased Bonanza pilot, George Carter, and his wife, Elizabeth, were survived by heirs, consisting of five dependent children, one of whom was a minor, all of whom were living in Williams, Arizona.

17. That the deceased aircraft passengers, George and Hortense Hoffman, were also survived by five adult children.

18. That the claim of the Carter heirs was settled with all the Carter heirs by Associated Aviation Underwriters/Federal Insurance Co. on behalf of Colorado Flying Academy for the total amount of $345,000.

Further, that the claim of the Hoffman heirs was settled by Associated Aviation Underwriters/Federal Insurance Co. on behalf of Colorado Flying Academy for a total of $45,000. That the total settlement was $390,000.

19. That Seneca 774 was in radar and radio contact with Denver Approach Control of the FAA at the time of the collision; that Richard S. Igel was the FAA employee providing radar services to the aircraft; and that Richard S. Igel was operating within the scope and authority of his employment for FAA at the time of the accident.

20. That prior to each of the practice back course ILS approaches to Runway 8 Right, Seneca 774 requested the controller to position the aircraft on the final approach course west of the Edgewater Intersection.

21. That just prior to the collision, Seneca 774 had been cleared for an 8R ILS back course approach.

22. That the FAA conducted a radar flight check of Denver Terminal Radar as a result of this accident on June 25, 1974.

FINDINGS OF FACT

Pursuant to Rule 16, F.R.Civ.P., a pre-trial order was entered which limited the issues for trial. In compliance with that order and in the same sequence, the court makes the following findings on the contested issues.

1. The increasing density of aircraft makes additional air traffic controls necessary to avoid mid-air collisions at certain U.S. high-density airports. By means of a Federal Aviation Regulation (FAR) set out in FAR Part 71, (14 Code of Federal Regulations §71.401), the FAA

established, as of March 28, 1974, a Denver Terminal Control Area (TCA) (Group II) around the primary airport of Denver, Stapleton International Airport, extending FAA Terminal Traffic Control for a radius of twenty miles from the center of the airport, extending from the earth's surface approximately 5,280 feet above Mean Sea Level up to an altitude of 11,000 feet above MSL, 5,700 feet above the terrain, with variations in altitude, depending upon the direction from the center.

2. Denver Approach Control was vectoring and assigning altitudes to Seneca 774 which was under the Air Traffic Control of Denver Approach Control at the time of the collision.

3. The instrument approach procedure which authorized a descent below 8,000 feet, west of Edgewater, permitted the Seneca to drop below the 8,000-foot MSL

protected shelf of the TCA and made it vulnerable to conflicting aircraft traffic passing underneath the TCA, which traffic was "compressed" or "squeezed" beneath the 8,000-foot shelf and above the 6,900-foot minimum altitude for flight over the City of Denver.

4. The Bonanza aircraft approaching from the south was capable of being seen on the radar scope, even though the Bonanza was not equipped with a transponder and, for a very brief time, it may have been off the screen as a result of tangential loss.

5. Carter's Bonanza, 27R, came from the right hand side of the Seneca, toward the Seneca, at a horizontal angle of approximately 40¼ to 60¼ to the right, as measured from straight ahead.

6. The doorpost "blind spot" in the Seneca did not preclude the Seneca

instructor pilot from seeing the Bonanza.

7. The Denver terminal radar was operating properly immediately prior to and at the time of the mid-air collision.

8. The FAA was not negligent in maintaining the Denver terminal radar system.

9. The plaintiffs proved damages as set forth in the Introductory Statement of this memorandum.

10. The radar surveillance provided by the Defendant United States in the Denver TCA was adequate.

11. The Defendant United States was negligent in the following respects:

a. In designing and establishing and maintaining the Denver TCA.

b. In failing to provide a "buffer zone" horizontally and vertically in the Denver TCA to provide separation between controlled and

uncontrolled traffic as they conflict near the boundary.

12. The defendant was negligent in establishing procecdures that did not provide a minimum of 500 feet vertical separation for TCA traffic from non-TCA traffic.

13. The Seneca pilot-instructor, Brian Gardner, was negligent in failing to see and avoid the Bonanza.

14. The design negligence of the defendant was a proximate cause of the mid-air collision.

15. The design negligence of the defendant was not a primary cause of the mid-air collision.

16. The negligence of Brian Gardner was a primary cause of the mid-air collision as was the negligence of George Carter.

17. The plaintiffs are not entitled to

indemnity for the settlement of the wrongful death claims of $1,300,000 in the amount of $390,000.

18. The plaintiffs' decision to make a settlement of the claims of the Carter and Hoffman heirs on behalf of CFA was a reasonable decision in view of the facts and circumstances surrounding the collision.

19. The total settlement payment to the heirs of the deceased Carters and Hoffmans was reasonable in light of the apparent total provable damages.

20. The amount paid in legal fees by the plaintiffs in negotiating the settlement with the Carter and Hoffman heirs was reasonable.

21. The trainee-pilot James Allen, in the Piper Seneca, was not negligent in the operation of the Piper Seneca.

22. The pilot of the Beechcraft Bonanza

was negligent in failing to maintain a proper lookout for other aircraft, in failing to see and avoid the Piper Seneca, and in the operation of the Beechcraft Bonanza as pilot-in-command.

23. Once the radar approach controller issued the clearance for final approach to the Seneca, it had the right-of-way over all other aircraft, pursuant to FAR 91.67.

CONCLUSIONS OF LAW

The substantive law of the State of Colorado governs this action. Richards v. United States, 369 U.S. 1, (1962). Colorado law provides that the violation of a statute or ordinance by one whom the statute or ordinance was designed to protect constitutes negligence as a matter of law. If such negligence proximately causes an injury, the offender cannot recover damages. Reed v. Barlow, 386 P.2d

979, 981 (Colo. 1963). Under visual flight conditions, regardless of whether an aircraft is proceeding according to an ATC clearance or receiving radar services, the primary and ultimate responsibility for the avoidance of mid-air collisions rests with the pilots of aircraft. Bibler v. Young, 492 F.2d 1351 (6th Cir.), cert. denied, 419 U.S. 996, (1974). The plaintiffs make exceedingly forceful arguments that this burden is unreasonable and impossible to bear under the circumstances presented. I have given these arguments long, serious and frequent consideration. Inevitably, however, I return to the fundamental precept that I must apply the law as I see it and not as I wish it to be.

The negligence of the pilots of Colorado Flying Academy's Seneca 774 is imputable to CFA and its insurers, plaintiffs Federal Insurance Company and Associated

Aviation Underwriters. The negligence of George Carter, pilot of the Bonanza is imputable to his heirs who seek to recover for his wrongful death, and likewise that negligence is imputable to an assignee who pursues the heirs' cause of action. The negligence on the part of pilot Carter is imputable by operation of law to plaintiffs CFA, Federal Insurance Company, and AAU.

Pilots Brian Gardner and George Carter each failed to maintain the level of vigilance required of pilots of the Federal Aviation Regulations and by good operating practice. When pilots operate within an airport traffic area, the duty to keep a proper lookout is sharpened because the sky is more congested. Thibodeaux v. United States, 14 Avi.Cas. 17,653 (E.D.Tex.1976), at 17,659. The language of the Federal Aviation Regulations

requires the pilot to operate on the assumption that there is other traffic. United States v. Miller, 303 F.2d 703 (9th Cir. 1962), cert. denied, 371 U.S. 955, (1963). The pilot has a continuing duty to be aware of danger with his own eyes and instruments. Spaulding v. United States, 455 F.2d 222, 226 (9th Cir. 1972).

The violations of the Federal Aviation Regulations and good operating practice by the pilots were the proximate causes of the collisions herein. Pilot Carter's operation of his Bonanza without regard for the airspace restrictions surrounding the Air Force Academy is indicative of further negligence when flying nearer the Denver TCA.

Air controllers are required to abide by the provisions of their manuals and must warn of dangers reasonably apparent to them. The guidelines issued by the FAA to

its regions prior to the accident concerning containment of terminal instrument procedures create no duty on the government toward the owners and occupants of small general aviation aircraft, since it is an internal memo and generates no justifiable reliance on the part of pilots. Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir.), cert. denied, 435 U.S. 1006, (1978). An air traffic controller has the right to rely upon the assumption that a pilot knows and will abide by all applicable Federal Aviation Regulations. Baker v. United States, 417 F.Supp. 471, 486 (W.D.Wash.1975). Likewise, he is not required to foresee or anticipate the unlawful, negligent or grossly negligent acts of pilots. Id.

The foregoing conclusions of law do not resolve all of the issues between the parties. Given the findings of negligence in

design, I must consider additional questions of law concerning the discretionary function. It is axiomatic that the United States is immune from suit save as Congress specifically consents to waive that immunity. United States v. Sherwood, 312 U.S. 584, (1941). When sovereign immunity is waived, Congress is permitted to specify the terms and conditions under which suits may be brought. Honda v. Clark, 386 U.S. 484, (1967). The Federal Tort Claims Act is a limited waiver of that immunity, and the United States may be found liable only in the manner and to the degree to which it has consented. Wright v. United States, 568 F.2d 153, 158 (10th Cir. 1977), cert. denied, 439 U.S. 824, (1978). Certain categories of torts are excluded from the Federal Tort Claims Act's coverage by 28 U.S.C. §2680. A court lacks jurisdiction

to entertain a claim so excluded. First National Bank v. United States, 552 F.2d 370, 374 (10th Cir.), cert. denied, 434 U.S. 835, (1977).

The provisions of the Federal Tort Claims Act, 28 U.S.C. §2671, et seq., and 28 U.S.C. §1346(b) do not apply to:

> (a) Any claim based upon the act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. §2680(a).

> [T]he "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules or operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of govern-

ment in accordance with official directions cannot be actionable.

Dalehite v. United States, 346 U.S. 15, 35-36, (1953); First National Bank in Albuquerque v. United States, 552 F.2d 370 (10th Cir.), cert. denied, 434 U.S. 835, (1977).

The United States may not be subjected to liability arising from the absence of stricter air safety regulations. Marr v. United States, 307 F.Supp. 930, 931 (E.,D. Okla.1969). The Federal Aviation Act of 1958 authorizes the Federal Aviation Administrator to regulate the use of navigable airspace by assignments thereof, to prescribe air traffic rules, and to promulgate other substantive rules in addition to operating the air traffic control system. The process employed by the FAA to propose, design, and develop the various

TCAs throughout the country was the administrative rule making process.

Whether the discretionary function exception applies, turns to some extent on:

> whether agency policy, as expressed in rules and regulations adopted by higher-ranking officials, is for lower-level personnel to make policy decisions on a case-by-case basis, guided only by general statements of agency philosophy, or whether such lower officials are required by rules and regulations to undertake limited specific functions upon being presented with a situation requiring some official action on their part.

In Re Air Crash Disaster Near Silver Plume, Colo., 445 F.Supp. 384, 402 (D.Kan. 1977). The functions performed by airspace specialists, like Mr. Wilson, in planning and designing the TCA configuration for a specific location involve judgment, planning and policy-making discretionary activities. They are therefore protected from tort claims. The

policy decision as to which instrument approach procedure should or should not be contained within the TCA is a decision which is incident, or directly related to, the attainment of the objectives sought by the creation of the TCA. The decision by the FAA not to provide for "buffer" zones or VFR corridors in TCA design is a policy judgment of the agency falling within the protection of the discretionary function exception.

A few issues remain, but the findings of fact and conclusions of law I have made concerning the negligence of plaintiffs and the discretionary function exception to the Tort Claims Act make detailed discussion unnecessary. The certification of the design of aircraft as airworthy is likewise a discretionary function. Even so, plaintiffs have not established by a preponderance of the evidence that the

certification of the Piper Seneca was negligent, erroneous or, for that matter, even incorrect.

A detailed analysis of the law of indemnity is not necessary, but I do note that indemnity is not precluded by voluntary settlement without giving notice to the indemnitor where the settling indemnitee can show that the indemnitor was in fact liable to the person receiving the settlement. Here, the defendant was not liable for the Carter-Hoffman claims. Hence, indemnity does not apply. Likewise, it is unnecessary to consider fully the defendant's contention that recovery of the claims added at trial were barred. I think defendant is clearly wrong since these were claims made by the plaintiff insurance companies who were brought into the case at the defendant's insistence after the original claims had been filed

by the original plaintiff, Colorado Flying Academy. Thus, were I to find defendant liable I would permit recovery of the amounts proven at trial.

IT IS ORDERED that judgment is hereby awarded to the defendant and against the plaintiffs. Each party shall bear its own costs herein expended.

DATED THIS 21st day of January, 1981.

/s/ John L. Kane, Jr.

John L. Kane, Jr.
United States District Judge

Footnotes

1. The transcript is as follows:

1531:40	90X:	OK, how's that look.
1531:45	Radar:	Um, I'll get it here shortly I think, you have traffic at twelve o'clock,

		three miles southeast bound.
	90X:	Roger, got him.
1532:05	Radar:	Seneca seven seven four roger, start the base in about four miles.
1532:20	Radar:	Nine zero xray, I don't know what's wrong with your transponder, but it shows, still showing zero six forty-six.
	90X:	Ok, I'll cycle it again and go back to zero six six seven.
	Radar:	That's correct sir.
1532:35	31Q:	Denver Radar Cessna five one three one Quebec is with you.

	Radar:	Cessna three one Quebec roger, Denver altimeter is three zero zero three.
	31Q:	Three one Quebec.
1532:55	Radar:	Nine zero xray turn northbound now for a right base entry, runway eight left.
	90X:	Roger, how's the transponder reading now, and are you reading me on the altimeter?
	Radar:	I have negative transponder reply at all now.
1533:05	90X:	OK, thank you.
1533:45	24R:	Denver Radar, Cessna three three two four Romeo.

1533:50	Radar:	Seneca seven seven four turn right heading zero one zero.
1533:55	774:	Zero one zero.
1534:00	Unk:	Two west of Cherry is twin Cessna (unintelligible).
	945:	Denver Radar Air Midwest nine forty-five is over Kiowa with Uniform.
1534:05	Radar:	Twin Cessna nine zero xray contact Denver Tower now one eighteen three.
1534:10	24R:	(Unintelligible) Two four Romeo, over.
	Radar:	Roger, two four Romeo go ahead.

	24R:	Two four Romeo is at seven thousand and request a three five ILS at Stapleton over.
1534:15	Radar:	Two four romeo turn left heading two niner zero maintain seven thousand, vectors ILS runway three-five approach.
1534:20	24R:	Two four romeo.
1534:25	Radar:	Aircraft over Kiowa, say again the number.
	945:	Air Midwest nine forty-five eight thousand five hundred with Uniform.
1534:30	Radar:	Air Midwest nine forty-five Denver, squawk code zero six

zero one.

1535:00 Radar: Air Midwest nine forty-five radar contact two west of Kiowa, traffic eleven o'clock and two miles, westbound.

945: Negative-contact, nine forty-five.

1535:10 945: OK, we got him now, nine forty-five.

1535:15 Radar: Roger nine forty-five, descend and maintain eight thousand at your discretion and report level.

945: OK, we'll call you at eight thousand, nine forty-five.

Radar: How's it look for a

		three-five ILS.
1535:25	Tower:	Five ILS, uh . . . I've got a United heavy to going and I won't have any departures after that.
	Tower:	It's OK for a three-five ILS (unintelligible).
	Radar:	We'll start him now.
1535:35	66Q	Denver Radar, twin Cessna six one six six Quebec.
	Radar:	Twin Cessna six six Quebec Denver, go ahead.
1535:40	66Q:	Six Quebec, I'm thirty DME south, southeast for landing Denver.

1535:50	Radar:	Twin Cessna six six Quebec, Denver, squawk zero six zero three, what is your altitude.
1535:55	66Q:	Six Quebec, eighty-five hundred feet, was that zero six zero three.
1536:00	Radar:	Zero six zero three for six six Quebec.
1536:05	66Q:	Six Quebec.
	774:	Seven seven four's on course.
1536:10	Radar:	Seven seven four I'm sorry about that, uh, cleared ILS back course runway eight right approach you're seven miles from Broadway Tower

		one eighteen three at Broadway.
1536:20	774:	Seven seven four.
	Radar:	Cessna two four Romeo is two and a half miles south of Cherry, turn right heading three three zero, cleared ILS runway three-five approach. Tower one eighteen three at Cherry.
	24R:	Two four Romeo.
1536:30	Radar:	November six six Quebec, radar contact twenty-three miles south of Stapleton and, uh, proceed up to the airport for a right base entry,

		runway eight left and descend and maintain eight thousand.
	66Q:	Six Quebec.
1536:40	945:	Air Midwest nine forty-five eight thousand.
1536:45	Radar:	Air Midwest nine forty-five thank you sir.
1536:55	774:	(Unintelligible) Mayday, mayday, seven seven four just hit a bird.
1537:00	Radar:	Seven seven four, uh, what's wrong?
	774:	Just hit a goose.
1537:05	774:	The left wing is in bad shape, we just hit a bird, we're

		heading straight in and we got full power . . . (unintelligible).
	Radar:	OK, seven four seven four maintain full power and uh continue straight in, standby this frequency.
1537:15	774:	We're never gonna be able to make the runway.
1537:20	774:	You got a helicopter possibly, we got a bad damage here.
	Radar:	You say you can't make the runway.
1537:25	774:	We got a bad crushed in the left wing tip.

1537:30	774:	You got a heli-copter, we're going to try to make it on a road here.
1537:35	Radar:	OK, try to make it on the road, OK, we'll get a heli-copter in that posi-tion right now.
	774:	We're going to ditch in the lake, we're going to ditch in the lake, is every-body alright.
	Radar:	OK, understand, ditch in the lake, we'll get a heli-copter right out there.
1537:50	774:	We're squawking seven seven

		(unintelligible).
1538:00	Radar:	We'll get a heli-copter right out seven seven four, just do the best you can, wind now at Stapleton one five zero degrees at seven.
1538:10	24R:	Denver Radar, Cessna three three two four Romeo is Cherry inboun
	Radar:	Two four Romeo, Tower one eighteen three.
1538:30	774:	OK, we've got a full right rudder and we're heading in toward the lake on final here.

SEPTEMBER TERM - November 8, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

COLORADO FLYING ACADEMY, INC., a Colorado corporation; FEDERAL INSURANCE COMPANY, and ASSOCIATED AVIATION UNDERWRITERS, Plaintiffs-Appellants,	)	No. 81-1485
v.	)	
THE UNITED STATES OF AMERICA, Defendant-Appellant.	)	

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc in the captioned appeal.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

s/Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

CERTIFICATE OF SERVICE

I, L. B. Ullstrom, one of the attorneys for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the fifth day of February, 1986, I served copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, by mailing copies in a duly addressed envelope, with first class postage prepaid, to the following attorneys of record:

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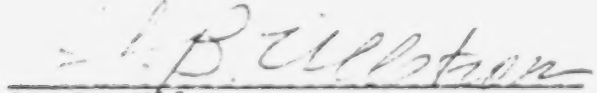

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AFFIDAVIT OF MAILING

I, L. B. Ullstrom, one of the attorneys for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the fifth day of February, 1986, I deposited in the United States Post Office located at 1823 Stout Street, Denver, Colorado, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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Attorneys for Petitioners

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

SUBSCRIBED AND SWORN to before me at Denver, Colorado this 5th day of February, 1986.

Linda S. Alexander
NOTARY PUBLIC
State of Colorado

My commission expires:
May 29, 1989

Supreme Court, U.S.
FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1453

In the Supreme Court of the United States

OCTOBER TERM, 1985

COLORADO FLYING ACADEMY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

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COLORADO FLYING ACADEMY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners assert that the Federal Aviation Administration (FAA) is liable for a mid-air collision between petitioners' aircraft and another private plane because of the FAA's alleged negligence in designing the terminal control area surrounding the Denver Stapleton International Airport.

1. a. In carrying out its responsibility to regulate navigable airspace, the FAA has created terminal control areas (TCAs), *i.e.*, airspace surrounding an airport that is subject to the control of air traffic controllers, throughout the country (Pet. App. A5). The primary purpose of the TCAs is to increase safety by separating commercial jets from smaller planes (*id.* at A5-A6). The TCA for the Denver Stapleton International Airport was established on March 28, 1974 (*id.* at A5). Although the FAA provided general

guidelines for TCA design, Gerald Wilson, an FAA airspace specialist, had the primary responsibility for designing the configuration of the Denver TCA (*id.* at A6). The TCA design in effect at the time of the accident was adopted only after proposals, public comment, and revisions (*ibid.*; *id.* at A13-A16, A34-A36).[1]

On June 21, 1974, a Piper Seneca owned by petitioner Colorado Flying Academy collided with a Beechcraft Bonanza (Pet. App. A3). The trainee pilot in the Seneca was practicing landing approaches using the instrument landing system (*ibid.*). Just prior to the collision, the Seneca had been cleared for a specified landing approach; the instructor was the pilot in command (*id.* at A4).[2] The approach glide brought the Seneca briefly below the floor of the TCA. At that time, the Bonanza, which was flying around Denver outside the TCA, flew into the Seneca's starboard side (*id.* at A7-A8).

b. Petitioners brought this suit against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages for the loss of the Seneca and indemnity for the payments they made in settlement with the heirs of the four persons who died in the Bonanza (Pet. App. A9). The district court dismissed petitioner's suit on the ground that it was barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), and the negligence of the two pilots (Pet. App. B23-B34; 506 F. Supp. 1221, 1227-1230). The court of appeals affirmed (Pet. App. A1-A43; 724 F.2d 871), ruling that the district

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[1]At the time of the accident, the Denver TCA resembled an inverted wedding cake with three layers surrounding the airport (Pet. App. A6-A7; see Pet. 17).

[2]The approached used is a published Instrument Approach Procedure designed by the FAA and known as the 8R ILS Back Course Approach (Pet. App. A3-A4).

court had properly applied the discretionary function exception (Pet. App. A16). The court of appeals also noted that the pilots' negligence might be a complete bar to petitioners' recovery under state law, which applies in suits against the government under the FTCA (*id.* at A40-A41).

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any other court of appeals, and presents no significant legal issue. Accordingly, review by this Court is not warranted.

a. Petitioners' own negligence bars any recovery in this case wholly aside from the discretionary function exception. Under Colorado law, which is applicable to this suit against the government under the FTCA (Pet. App. B23), comparative negligence acts as a complete bar to any recovery where the plaintiff's negligence is greater than "the negligence of the person against whom recovery is sought." Colo. Rev. Stat. § 13-21-111(3) (1973); *Graf* v. *Tracy*, 194 Colo. 1, 4 & n.5, 568 P.2d 467, 468 & n.5 (1977); Pet. App. A41.[3] The district court found that the negligence of the instructor pilot of the Seneca "was a primary cause of the mid-air collision" (Pet. App. B21).[4] By contrast, the

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[3]In addition to petitioners' direct claim for the loss of the Seneca, which is barred by the pilots' greater negligence, petitioners also assert a claim for indemnification for the amounts paid in settlement to the heirs of the occupants of the Bonanza (Pet. App. A24-A25). However, petitioners would be entitled to indemnification only if they are secondarily liable and the party from whom they seek recovery is primarily liable (*id.* at A28). The district court expressly found that each pilot's negligence was a primary cause of the collision while the FAA's negligence was not a primary cause (*id.* at B21), and the court of appeals affirmed (*id.* at A28). Accordingly, petitioners' indemnity claims are also barred by the pilots' negligence. Petitioners do not pursue their indemnity claim in this Court.

[4]The district court also found that the negligence of the pilot of the Bonanza was a primary cause of the accident (Pet. App. B21). As the district court explained, "each [pilot] failed to maintain the level of

negligence of the FAA in designing the TCA was found to be a proximate, but not a primary, cause of the mid-air collision (*ibid.*). These findings, which were not disturbed by the court of appeals, do not merit further review. See, *e.g., United States* v. *Doe*, 465 U.S. 605, 613-614 (1984); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). Accordingly, because the negligence of petitioner's pilot was greater than the negligence of the FAA, petitioners could not recover under state law regardless of the scope of the discretionary function exemption to the FTCA.[5]

Petitioners contend (Pet. 54-57) that the lower courts improperly applied a per se rule that the pilots were negligent merely because they had a collision. However, the district court's finding of negligence was not based solely on the occurrence of the collision. The district court also found that the accident occurred in clear weather with a visibility of 60 miles (Pet. App. B9), that the Seneca's blind spot did not prevent the instructor pilot from seeing the Bonanza (*id.* at B19-B20), and that the instructor pilot was negligent in failing to see and avoid the Bonanza (*id.* at B21). The district court's finding that the pilots were not sufficiently vigilant in maintaining a proper lookout for other aircraft, and were thereby negligent, is consistent with the decided cases. See, *e.g., Rudelson* v. *United States*, 602 F.2d 1326, 1330 (9th Cir. 1979) (pilot negligent because of failure to watch for other planes as required by FAA regulations).

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vigilance required of pilots [by] the Federal Aviation Regulations and by good operating practice. When pilots operate within an airport traffic area, the duty to keep a proper lookout is sharpened because the sky is more congested" (*id.* at B25).

[5]The district court's failure to fix exact percentages for the negligence of each party was, at most, harmless error. See *Lonardo* v. *Litvak Meat Co.*, 676 P.2d 1229 (Colo. App. 1983) (jury's failure to apportion negligence of each party was harmless where appellate court could rely on jury's other findings to determine whether plaintiff's recovery was barred under the state comparative negligence statute).

Petitioners have cited no decision to the contrary. Accordingly, because the pilots' negligence bars any recovery by petitioners against the United States irrespective of the discretionary function exception, further review of their claims is not warranted.

b. In any event, the lower courts correctly held that the discretionary function exception bars relief in this case. The FTCA is a limited waiver of sovereign immunity that makes the federal government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. The discretionary function exception, however, precludes liability for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 U.S.C. 2680(a)).

As this Court explained in *Dalehite* v. *United States*, 346 U.S. 15, 33 (1953) (footnote omitted), the scope of this exception is broad, covering not only federal agencies but "all employees exercising discretion." "It * * * includes determinations made by executives or administrators in establishing plans, specifications or schedules of operation. Where there is room for policy judgment and decision there is discretion" (*id.* at 35-36 (footnote omitted)). *Dalehite*'s broad interpretation of the exception's scope was reaffirmed in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). There, the Court stressed that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case" and that "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability" (*id.* at 813).

The FAA's activities through which the Denver TCA was established fall squarely within the discretionary function exception to the FTCA. *Varig* held that allegedly faulty airplane inspections were within the exception, and that a particular inspection decision was not outside its scope simply because it applied general agency policy or specific regulations to a given factual situation (see *id.* at 814-820). For the reasons given by the lower courts (Pet. App. A13-A16, B31-B32), upon whose opinions we rely, the FAA's actions regarding the planning, design, and implementation of the Denver TCA are not materially different from the type of activities that *Varig* found covered by the discretionary function exception.

Petitioners erroneously assert (Pet. 21-43) that the court of appeals' decision conflicts with the post-*Varig* decisions of other courts of appeals. None of the cases petitioners cite which hold the discretionary function exception inapplicable[6] involved the FAA's design of TCAs or any similar type of activity.[7] Indeed, the FAA's actions in designing the

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[6]Most of the cases that petitioners cite held that the discretionary function exception barred suit against the government. See *Ostera* v. *United States*, 769 F.2d 716, 718 (11th Cir. 1985) (decision whether to release prisoner for use as an informant); *Baxley* v. *United States*, 767 F.2d 1095, 1097-1098 (4th Cir. 1985) (FAA's decision not to regulate "ultralight" aircraft); *Shuman* v. *United States*, 765 F.2d 283, 292-294 (1st Cir. 1985) (alleged failure to warn government contractors' employees of the hazards of asbestos); *Feyers* v. *United States*, 749 F.2d 1222, 1227 (6th Cir. 1984) (alleged failure properly to supervise private inspections of railroad cars), cert. denied, No. 84-1423 (May 28, 1985); *General Public Util. Corp.* v. *United States*, 745 F.2d 239, 248 (3d Cir. 1984) (alleged failure to warn of nuclear reactor equipment failure and failure to exercise due care in licensing nuclear reactor), cert. denied, No. 84-790 (Feb. 19, 1985). None of these decisions, therefore, conflicts with the court of appeals' decision here.

[7]In two cases, an agency violated its own regulations or procedures. See *National Carriers, Inc.* v. *United States*, 755 F.2d 675, 677-678 (8th Cir. 1985) (failure to follow regulations regarding contaminated beef); *McMichael* v. *United States*, 751 F.2d 303, 306-307 (8th Cir. 1985)

Denver Stapleton TCA qualify under petitioner's own analysis of the exemption. Petitioners concede (Pet. 45-46) that the FAA had the discretion to decide whether to adopt a TCA system, where to locate TCAs, and how TCAs should be designed. Petitioners claim (Pet. 46-47) that the FAA required that all instrument approaches be entirely within each TCA, and that the designer of the Denver TCA failed properly to implement this decision. However, that argument is factually erroneous, as both courts below held (Pet. App. A13-A15, B31-B32).[8] As the court of appeals found (*id.* at A13-A14), the FAA directive on which petitioners rely provides local airports with the discretion to tailor the design of TCAs to fit local needs. Moreover, the trial testimony showed that only those instrument approach procedures normally used by large turbine-powered aircraft, not the type of aircraft involved in this accident, were to be contained within the TCA airspace.[9] The decision not

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(munitions inspectors merely "review[ed] [a] checklist for safety compliance" and therefore did not make discretionary judgments). The other case involved the negligent placement of buoys. See *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985). Because the FAA's activities in designing and operating terminal control areas is far more similar to the agency's activities in *Varig* than the government's actions in *Drake*, *Drake* offers petitioners no support.

[8]Indeed, contrary to petitioners' assertions, the court of appeals appears to have accepted petitioners' characterization of the discretionary function exception (Pet. App. A12). The court of appeals noted that "[i]f such mandatory guidelines [for the design of TCAs] existed and they were violated, then the discretionary function exception would not bar recovery" (*ibid.*).

[9]The evidence at trial revealed a policy disagreement at the Washington level between various divisions within the FAA over the manner in which safety objectives would best be achieved. Ultimately, the policy that all instrument approach procedures would be fully contained within TCA airspace was adopted two years after the accident at issue in this case (X Tr. 20-22; see generally Appellee's Br. 13-17). This decision represented a change in policy at the Washington level that required adjustments to a number of existing TCAs. It does not indicate any misapplication of the FAA's original policy by the Denver TCA designer.

to include within the Denver TCA all of the approach procedures used by the Seneca aircraft was within the discretion of the individual TCA designer. Accordingly, even under petitioners' interpretation of the discretionary function exception, that exception was correctly applied in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1986

DOJ-1986-05